1996

Developments in Constitutional Law: The 1994-95 Term

Hester Lessard

Bruce Ryder

David Schneiderman

Margot Young
Allard School of Law at the University of British Columbia, myoung@allard.ubc.ca

Citation Details

David Schneiderman, Hester Lessard, Bruce Ryder & Margot Young, "Developments in Constitutional Law: The 1994-95 Term" (1996) 7 Sup Ct L Rev (2d) 81.

DEVELOPMENTS IN CONSTITUTIONAL LAW: THE 1994-95 TERM

Hester Lessard
Bruce Ryder
David Schneiderman
Margot Young*

I. INTRODUCTION

The past year's decisions display an expanding area of judicial consensus with respect to the focus of Charter protections. The central political figure in the landscape of the Canadian polity appears to emerge strikingly and most simply as the familiar individual of classical liberal theory, a particle of will and self-interest too abstract to have much character or texture. Absent is explicit judicial recognition of personal markings that grant detail, group membership, or particularity to this image.

We are provided, however, with an account of the institutions and practices through which this political actor presumably has chosen to pursue happiness and well-being. The key features of this backdrop are the traditional patriarchal marriage, a belief in scientific reason, tolerance of individual religious choices, and respect for the individual achievements of the talented and industrious. Such is the composite picture of civil society which emerges from a careful piecing together of the winning and losing situations of the various real individuals who are the litigants in this Term's cases.

Working backwards from this set of constitutionally recognized and protected social choices, one is able to flesh out the creature who fictively populates the realm of the *Canadian Charter of Rights and Freedoms*. It turns out he is socially male. He defines himself in terms of his professional reputation; he is heterosexual, married or in a "marriage-

* Hester Lessard is Associate Professor, Faculty of Law, University of Victoria. Bruce Ryder is Associate Professor, Osgoode Hall Law School, York University. David Schneiderman is Executive Director, Centre for Constitutional Studies, University of Alberta. Margot Young is Assistant Professor, Faculty of Law, University of Victoria.

like" relationship. He is the breadwinner on whom his family depends and whose priorities shape the family unit even after separation and divorce. He is not a member of a subordinated cultural or religious community. He is tolerant of the personal choices made by others so long as they do not challenge his own moral vision and do not amount to the extraction of concessions on behalf of self-interested groups. Although he places his faith in the free flow of ideas to ensure the maintenance of democracy and political accountability, that faith is tempered by anxieties concerning an unstable social order and the loss of social status.

While this judicial creation is neither surprising nor new, one cannot help but notice the virtual disappearance of alternative accounts of social relations or beings. In particular, only L'Heureux-Dubé J. still seems committed to the notion that the individual, although treasuring autonomy above all, is inevitably situated within a diverse, often contradictory, network of specific political and social relations determining the texture and meaning of both self and community. In the past, this variation on the classical liberal theme has produced decisions in which the Supreme Court of Canada strove to make the Charter relevant to social justice and the claims of the most marginalized and powerless within Canadian society. No longer does this seem to be a concern of the majority of the Court.

Our essay this year explores the apparent triumph of the individual of classical liberalism. We trace in the various decisions of this Term this common thread. Yet, our analysis also examines the particular way in which this political imagery of the individual is compounded by its interaction with judicial assumptions about important social institutions: the family, religion, media, and the state. What is revealed is the judicial adoption of an intricate social and political map in which abstract individualism combines with, and often masks, traditional, conservative images of social order and moral choice.

This combination of the liberal individual with conservative moral ordering should not be strange to us, for it is evocative of the neo-conservatism which increasingly dominates mainstream politics of western nations. Clustered together in politics are a number of elements: the triumph of individualism over collectivism; increased hostility to complex equality claims; rejection of the redistributive logic of the welfare state and the interventionist role of a central government; enshrinement of *laissez-faire* economics; and, conservative conceptions of morality and religion.[1] It is this constellation of political values that lends coherence to the current Supreme Court's constitutional jurisprudence.

[1] Resnick, "The Ideology of Neo-Conservatism", in McCullough (ed.), *Political Ideologies and Political Philosophies* (1989).

In exploring this understanding of recent Supreme Court politics, we begin with a brief summary of the Court's decisions with respect to federalism and the division of powers. This is then followed by several sections which explore the Court's increasing reliance on the imagery and rhetoric associated with classical liberalism and, in particular, on the notion of the rights holder as an abstract unencumbered unit of undifferentiated will and desire. For example, Part III traces the shift in analysis under section 15 of the Charter in the cases of *Egan v. Canada*[2] and *Miron v. Trudel*[3] to more formal understandings of equality and away from historically and socially situated notions of the individual rights holder. Part IV explores some of the practical consequences of this ideological shift in terms of the increase in judicial resistance towards recognizing positive obligations on the government to facilitate access to Charter rights and freedoms.

The next two sections illustrate the combination of individualism and traditional morality which we have identified as the central feature of neo-conservatism. In these sections, we focus on the role of the family and religious institutions in the judicial construction of Canadian civil society. Thus, in Part V, we return to the equality cases to examine the way in which the imagery of the free and rational individual is used to legitimate and, to some extent, sanctify state privileging of heterosexist and patriarchal familial relations. This theme is continued in Part VI which discusses the case of *B.(R.) v. Children's Aid Society of Metropolitan Toronto*.[4] Here the focus is on the way in which subordinated religious and cultural communities are inevitably portrayed as irrational and dangerous within the lexicon of reasonable limits on negative spheres of individual choice which has become orthodox in the analysis of the fundamental freedoms in section 2 of the Charter.

In Part VII, we turn to yet another pivotal institution in the organization of liberal societies, namely, the media. In this Part, we draw out the contrasting political roles the Court assigns to the media in its decisions in *Canadian Broadcasting Corp. v. Dagenais*[5] and *Hill v. Church of Scientology of Toronto*.[6] These cases deal with the constraints imposed on freedom of expression by court-ordered publica-

[2] [1995] 2 S.C.R. 513.
[3] [1995] 2 S.C.R. 418.
[4] [1995] 1 S.C.R. 315.
[5] [1994] 3 S.C.R. 835.
[6] [1995] 2 S.C.R. 1130.

tion bans and defamation law respectively. In addition to highlighting the difficulties posed for legal ordering by the development of new communication technologies, our discussion considers the political logic underlying the striking contrast in the Court's treatment of the privacy interests of criminal defendants in *Dagenais* and those of defamed professionals in *Hill*. We continue our analysis of *Dagenais* and *Hill* in Part VIII by examining the manner in which the Court resolves the threshold issue for both these cases of the Charter's application to judicially-developed limits on freedom of expression. In this penultimate section of the essay, we argue that the Court's willingness to apply Charter values to the development of the common law is better understood as an affirmation rather than a rejection of the familiar divide between public and private. Finally, we conclude with some observations about how this Term's decisions ought to affect our understanding of the politics of the Charter generally.

II. FEDERALISM

Before embarking on an exploration of our major themes, a small detour is necessary to explain why we devote so little space to a discussion of federalism issues in this essay. The focus of our analysis is on Charter decisions for a simple reason: this Term the Court did not issue any decisions dealing with aboriginal rights, and in its only two division of powers decisions, the Court issued cursory one paragraph judgments dismissing the appeals.

While clearly the Charter continues to dominate the Court's constitutional agenda, the near complete absence of other issues on the docket this Term is unusual. It may be partly just a fortuitous hiatus, as in the coming Terms we will see some of the Court's attention turn to defining the scope of the federal criminal law[7] and peace, order and good government powers,[8] and to deciding a number of pivotal appeals in relation to aboriginal rights.[9]

Yet it appears that another part of the explanation is that the Court did a poor job of managing its federalism docket this Term. One wonders, for example, why leave was granted in the *Transgas* case.[10] Tallis J.A. had written a thorough and convincing judgment

[7] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

[8] *A-G. Canada v. Hydro-Québec*, [1995] A.Q. No. 143 (C.A.), leave to appeal to S.C.C. granted, B.S.C.C., October 13, 1995.

[9] See, *e.g.*, *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.); leave to appeal to S.C.C. granted, 170 N.R. 363*n*.

[10] *Transgas Ltd. v. Mid-Plains Contractors Ltd.*, [1994] 3 S.C.R. 753.

on behalf of the Saskatchewan Court of Appeal[11] upholding a provision of the federal *Income Tax Act* that permitted Revenue Canada to collect tax owed from the creditors of tax debtors. Justice Tallis concluded that the encroachment on provincial jurisdiction in relation to property and civil rights was necessarily incidental to a valid tax collection scheme. This approach was consistent with recent judgments of the Supreme Court that have given both federal and provincial taxation powers a liberal interpretation.[12] It was hard to discern the new or controversial points that would be raised on appeal. Not surprisingly, the Court agreed summarily with Tallis J.A. in an oral judgment from the bench.

In the only other federalism decision of the Term, the Court also summarily dismissed the appeal from the bench. The federalism issue raised by *Ontario v. Canadian Pacific Ltd.*[13] was the extent to which provincial environmental protection statutes could validly apply to federally-regulated undertakings. Given that this was the first Supreme Court decision to consider the application of the interjurisdictional immunity doctrine in the environmental context, the Court's cursory dismissal of the federalism issue is perplexing. The Ontario Court of Appeal had upheld the application of the challenged provision (dealing with the emission of contaminants) on the grounds that the *Environmental Protection Act* "as a whole" is not "aimed at management".[14] This appeared to be a different test for interjurisdictional immunity — one more friendly to provincial jurisdiction — than that most recently propounded by the Supreme Court in *Bell Canada v. Quebec (CSST)*.[15] The Supreme Court affirmed, saying simply[16] that the issue was determined by the Privy Council's 1899 decision in *Notre Dame de Bonsecours*.[17] Constitutional lawyers who bothered to dust off copies of the Appeal Cases will have discovered that the *Bonsecours* decision turned on the distinction between

[11] (1993), 101 D.L.R. (4th) 238 (Sask. C.A.).

[12] *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 446; *Reference re: Quebec Sales Tax*, [1994] 2 S.C.R. 715; *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371.

[13] [1995] 2 S.C.R. 1031.

[14] *Ontario v. Canadian Pacific Ltd.* (1993), 103 D.L.R. (4th) 255 (Ont. C.A.).

[15] [1988] 1 S.C.R. 749. This case suggests that any provision of a provincial law must be read down if it has the effect of touching matters that are "an essential part of the management of a federal undertaking".

[16] *Supra*, note 13, at para. 32.

[17] *Canadian Pacific Railway Co. v. Notre Dame de Bonsecours (Parish)*, [1899] A.C. 367.

the structure of railway ditches and their maintenance. Lord Watson said a provincial law could apply only to the latter. How this arcane distinction is to guide decision-making in relation to modern environmental statutes, and how it is to be squared with the more conceptually ambitious pronouncements on the interjurisdictional immunity doctrine emanating from the late twentieth century case law, are matters that, curiously, the Court decided not to discuss. We are left to surmise that the Court does not deem the maintenance of physical facilities to be essential parts of the management of federal undertakings and, thus, the interjurisdictional immunity doctrine is not applicable.

Meanwhile, the justices were denying leave to appeal in a number of cases that raised interesting and unresolved constitutional issues. They denied leave to appeal a Saskatchewan ruling that provincial labour laws could apply to provincial government employees engaged in the federally-regulated activity of aeronautics,[18] despite an apparently conflicting result in Ontario.[19] Leave was denied to a British Columbia ruling that plaintiffs in maritime tort actions could not claim the advantages of provincial dependants' claims legislation,[20] despite the fact that the Supreme Court has upheld the application of provincial contributory negligence statutes in the same context.[21] Also, leave was denied to a New Brunswick ruling that provisions of the provincial *Medical Act* authorizing the suspension of a licence of any doctor performing abortions outside a hospital were, in pith and substance, criminal law and thus invalid,[22] despite the obvious differences between these provisions and the Nova Scotia legislation struck down for the same reasons in the Court's most recent *Morgentaler*[23] judgment.

In sum, members of the Court chose not to use their limited time and resources to fine-tune the division of powers doctrine this Term.

[18] *Canadian Assn. of Fire Bomber Pilots v. Saskatchewan*, (1993), 119 Sask. R. 161 (Q.B.); leave to appeal to S.C.C. refused, unreported, summarized in B.S.C.C., February 3, 1995, at 254.

[19] *Ontario Public Service Employees Union v. Ontario* (1994), 16 O.R. (3d) 735 (Div. Ct.).

[20] *Shulman v. McCallum* (1993), 79 B.C.L.R. (2d) 393 (C.A.); leave to appeal to S.C.C. refused, unreported, summarized in B.S.C.C., May 20, 1994, at 853.

[21] *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802.

[22] *Morgentaler v. New Brunswick (Attorney General)* (1995), 121 D.L.R. (4th) 431 (N.B.C.A.); leave to appeal to S.C.C. refused, unreported, summarized in B.S.C.C., August 25, 1995, at 1311.

[23] *R. v. Morgentaler*, [1993] 3 S.C.R. 463.

Even when the judges came close to doing so, as in *Transgas*[24] and *Canadian Pacific Ltd.*,[25] they appear to have become bored by the prospect. It is the Charter that captured the Court's constitutional attention this Term. And, thus, it is to an analysis of the Charter decisions that we now turn for the balance of our paper.

III. ABSTRACT INDIVIDUALISM AND THE PATH NOT TAKEN

As noted in our introduction, the shift to the unencumbered individual as paradigmatic rights holder is observed most clearly in the equality cases of this term. Since *Andrews v. Law Society of British Columbia*[26] and until this Term's equality decisions, two different approaches to equality doctrine have been in contention. One approach, best represented by McIntyre J.'s rejection of the "similarly situated" test in *Andrews* and picked up in Wilson J.'s judgments in the same case and in *R. v. Turpin*,[27] stresses a contextualized, substantive understanding of equality. Consideration of an equality claim under section 15 was to be a contextual inquiry, looking to the larger social, political and legal context of the group in question. Absent this, Wilson J. warned, "the section 15 analysis may become a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation."[28] The individual who emerged from this understanding was situated in and only understood in reference to the larger social groupings and contexts which structured her or his identity, entering the analysis already contoured and made concrete by her or his political and historical environment. The equality concern was to prevent the perpetuation and exacerbation of pre-existing inequality: to protect the historically and systemically vulnerable and to remedy past discrimination. Thus, in *Swain*, Lamer J. wrote: "... the overall purpose of s. 15 [is] to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society."[29]

[24] *Supra*, note 10.

[25] *Supra*, note 13.

[26] [1989] 1 S.C.R. 143.

[27] [1989] 1 S.C.R. 1296.

[28] *Id.*, at 1332.

[29] *R. v. Swain*, [1991] 1 S.C.R. 933 at 992. See also Wilson J.'s judgment in *Turpin, supra*, note 27, at 1333 identifying the purposes of s. 15 to be "remedying or preventing discrimination against groups suffering social, political, and legal disadvantage in our society".

With this same equality goal in mind, Wilson J. stated in *Turpin*:

> ... it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context...
>
> Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.[30]

The second approach to equality doctrine, also distilled within McIntyre J.'s judgment in *Andrews*,[31] prescribes a more formal framing of equality conflicts. While recognizing the fact that similar treatment is not always equal treatment, proponents of this perspective argued that the prioritizing of equality claims required by the discrete and insular minority approach ran counter to fundamental equality principles.[32] Instead, some have located within McIntyre J.'s judgment a more formal understanding of equality, highlighting his statement that

> [d]istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.[33]

The markers of discrimination are here irrelevant stereotyping and group identification; the character and history of the group in question are not critical.

The debate over what vision of equality should be captured by section 15(1) thus centred on the meaning of the notion of discrimination. The first two stages of McIntyre J.'s inquiry in *Andrews* —

[30] *Supra*, note 27, at 1331-32.

[31] McIntyre J.'s judgment in *Andrews* is, perhaps, most remarkable for its ability to be anything to anyone. At different moments, McIntyre J. rejected the similarly situated test (*supra*, note 26, at 166-68), implicitly adopted the relevancy test which is the hallmark of the similarly situated test (at 174-75) and endorsed a contextual analysis (at 164).

[32] See, *e.g.*, Gibson, *The Law of the Charter: Equality Rights* (1990), at 150-57. Gibson writes that such a reading of s. 15 would require a "gross distortion" of the text of the section (*id.*, at 152). A similar critique can be found in Hogg, *Constitutional Law of Canada*, 3rd ed. (1992) at 1171-76.

[33] *Supra*, note 26, at 174-75.

identification of different treatment and of a consequential harm — were uncontroversial. But whether or not, in order to constitute discrimination, such a harm had to exacerbate an existing group inequality or merely impose group stereotyping (which meant distinctions not based on nature, merit, or choice) remained in issue.

Equality cases which followed *Andrews* and *Turpin* illustrate the tension between these two conceptual strands. In *Weatherall v. Canada (Attorney General)*,[34] a case involving male prisoners denied the guarantee granted to female prisoners of having frisk searches and patrols conducted only by prisoner guards of the same sex, the unanimous Court seemed unable to decide which approach to take. Justice La Forest's reasoning on behalf of the Court emphasized, first, a fixed biological backdrop and, then, the social and historical reality of the group to which the claimant belonged:

> [g]iven the historical, biological and sociological differences between men and women, equality does not demand that practices which are forbidden where male officers guard female inmates must also be banned where female officers guard male inmates.[35]

In the next two sentences, he went on to note that the "historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are the victims" and that "[b]iologically, a frisk search ... of a man's chest area ... does not implicate the same concerns".[36] Jumbled together are assessments of the group context of the male complainant and the question of whether the distinction is one which is sensible in "nature". The Court, thus, illustrated its inability or, perhaps, reluctance to pick between the two conceptions of anti-discrimination protections. Indeed, in its subsequent equality decisions, the Court continued to be at pains to rationalize the result in *Weatherall*.

The ambiguous heritage of *Andrews* continued to shape the equality landscape until the simultaneous release of the three major equality cases of this Term — *Egan*,[37] *Miron*[38] *and Thibaudeau*.[39] The *Egan* case involved a challenge to the denial of old age spousal allowances to gay and lesbian couples. The *Miron* case involved a

[34] [1993] 2 S.C.R. 872.

[35] *Id.*, at 877.

[36] *Id.*

[37] [1995] 2 S.C.R. 513.

[38] [1995] 2 S.C.R. 418.

[39] *Thibaudeau v. R.*, [1995] 2 S.C.R. 627.

challenge by an individual, in an unmarried heterosexual relationship, to the constitutionality of providing certain statutory disability benefits in automobile insurance contracts only to married couples. At issue in *Thibaudeau* was the validity of the "inclusion/deduction scheme" for the treatment of child support payments under the *Income Tax Act*.[40] We will return to a discussion of the particular issues raised by these cases in Part V below. For the moment, we will focus on the general approaches to section 15(1) of the Charter set out by the judges in *Egan* and *Miron*, for it was in these two cases that the Court clearly communicated which of the two senses of equality it now favours.

With the exception of L'Heureux-Dubé J., the judges all rejected the substantive approach — and its contextualized individual — articulated in earlier Charter equality jurisprudence. Lost is a sense of discrimination as a phenomenon uniquely affecting groups identified as vulnerable or relatively powerless. Instead, discrimination in the eyes of the Court has become simply the mistreatment of individuals on the basis of group stereotypes: a failure to treat individuals in terms of the individual qualities of merit, choice, or nature — the typical characteristics of differentiation which are taken to "make sense".

The test adopted by Gonthier and La Forest JJ. in *Miron* and *Egan*, respectively, and concurred in by Lamer C.J. and Major J. in both cases, is clearest in its rejection of a substantive approach to equality doctrine and the accompanying contextualized understanding of the individual. Justice Gonthier's dissent in *Miron* most clearly articulated this rejection. Here, Gonthier J. began by setting out the three elements necessary to establish a violation of section 15: first, a legislative distinction between the claimant and others that, second, results in a disadvantage, burden, or obligation and, that, third is based on an "irrelevant personal characteristic" which is either enumerated in section 15(1) or analogous to enumerated grounds.[41] The third step breaks down further into a determination of, first, the personal characteristic shared by the group singled out by the legislation and, second, the relevancy of such a characteristic given the functional values underlying the legislation.[42]

This latter branch of the third step — the inquiry into the relevancy of the distinguishing personal characteristic of the group singled out by the legislation — marks Gonthier J.'s departure from the first and

[40] For a description of this scheme, see the text accompanying note 126, *infra*.

[41] *Supra*, note 38, at 435.

[42] *Id.*, at 436.

more substantive strand of earlier equality jurisprudence. The focus is no longer the context of the group with which the individual claimant is aligned and the exacerbation of a pre-existing contextual disadvantage by the legislative distinction at issue. Instead, at issue only is the character of the distinction drawn and the place such a distinction occupies within "physical or biological reality, or fundamental value[s]".[43] Invocation of the protection offered by section 15(1) requires only a finding of an "irrelevant" distinction: a distinction which fails to map on to some judicially identified and legislatively mirrored moral or natural truth.[44] Thus, this test bears no conceptual link to the enumerated or analogous grounds approach and the pre-existing group context of disadvantage that approach required.

Justice Gonthier did, nevertheless, still lay claim to a contextual approach, stating that:

> [c]ontext is indispensable to identifying the appropriate groups to be compared, to determining whether prejudice flows from the distinction, and to assessing the nature and relevancy of the personal characteristic upon which the distinction is drawn.[45]

However, such a discussion seems no more than an obligatory nod to past jurisprudential warnings about the aridity of a decontextualized analysis. Justice Gonthier did not allow the larger social and historical pattern of Canadian society to enter into his analysis — although this is, of course, the context to which past judgments allude. In fact, Gonthier J. explicitly rejected an analysis that would allow pre-existing contexts of privilege or disadvantage to determine equality assessments: "membership in such a disadvantaged group is not an essential precondition for bringing a claim under section 15 of the Charter."[46] The individual claimant in Gonthier J.'s analysis must establish his or

[43] *Id.*, at 438.

[44] Justice Gonthier did allow that the finding of a fit between a legislatively identified value and the characteristics upon which a legislative distinction is drawn will not always be enough to indicate the absence of discrimination. Such a finding will not suffice where "the underlying values" of the legislation themselves "are irrelevant to any legitimate legislative purpose". *Id.*, at 436. Relevancy would then be assessed by reference to an enumerated or analogous ground of s. 15. *Id.* Such an examination into the larger relevancy of the legislative values at stake was, however, unnecessary in *Miron*. Justice Gonthier had little difficulty identifying and accepting as legitimate the *Insurance Act*'s privileging of marriage over other intimate living arrangements. *Id.* at 461-62.

[45] *Id.*, at 437-38.

[46] *Id.*, at 436. To the extent that such a context of disadvantage is relevant, it is only as an indication that the distinction in question is drawn on the basis of an irrelevant personal characteristic.

her claim of discrimination in abstraction from the larger social context. Discrimination signals not the exacerbation of group inequality but, rather, the denial of individual uniqueness and autonomy. Irrelevant stereotyping is an individual, not a group, harm. Contextualization, thus, for Gonthier J., must have a more confined role. It is to be used to manipulate the findings of the first and second steps of his test — characterization of group membership and the effect of the legislative distinction — but not to preserve the powerful anti-majoritarian force of equality protections for those against whom the majority most often acts: the already disadvantaged minorities of our society. At the third stage of Gonthier J.'s inquiry, context matters only in the sense of the legislative and, if necessary, larger "natural" backdrop of value and judgment against which the relevancy assessment is made.

The result is that Gonthier J.'s test frames the equality issues at stake in terms of the very contexts — those of "traditional values" and "common sense" — that equality theory at its best must challenge. After all, it has been traditional values — in both their legislative and social manifestations — which have left us our rich legacy of discrimination. If equality theory challenges only laws at odds with such values, then much that is problematic from an equality perspective will be left unrevealed. Thus, the context that shapes and constrains Gonthier J.'s analysis is precisely the context that a rigorous equality analysis demands be scrutinized.

While glaringly out of line with some past equality jurisprudence, Gonthier J.'s analysis is less original than one might at first glance assume.[47] Certainly in his explicit reliance on the notion of relevancy his test differs from other previous tests.[48] But, as Gonthier J. himself pointed out, the requirement of relevancy is simply a logical generalization of McIntyre J.'s exclusion of distinctions based on merit or

[47] For example, Leon Trakman has described Gonthier J.'s assertion of legislative relevance as "novel", claiming that Gonthier J. diverged from *Andrews*: "Section 15: Equality? Where?" (1995), 6 Constitutional Forum 112 at 114.

[48] Importation of the question of relevancy, or means/ends fit into the s. 15(1) stage of analysis was strongly and convincingly criticized by the five judges who did not subscribe to Gonthier J.'s approach in the equality trilogy. See L'Heureux-Dubé J. in *Egan*, *supra*, note 37, at 546-48; Cory and Iacobucci JJ. in *Thibaudeau*, *supra*, note 37, at 700-01, and McLachlin J. in *Miron*, *supra*, note 38, at 487-92 (Sopinka J. concurring). In addition to pointing out that Gonthier and La Forest JJ. were willing to sanctify discriminatory ends as "fundamental values", the other judgments argued that Gonthier J.'s relevancy test confuses s. 15 functions with those of s. 1. It does this, they argued, by imposing a higher burden on the claimant and, as well, by importing into s. 15 elements of the s. 1 proportionality test. Gonthier J. responded, rather unconvincingly, by distinguishing "relevancy" from "reasonableness" (*Miron*, *id.*, at 444-46).

capacity from the charge of discrimination. As Gonthier J. wrote: "... a criterion defined in terms of stereotype based on presumed group characteristics, rather than on the basis of merit, capacity or circumstances, is but an elaboration of the concept of relevance."[49]

Moreover, the relevancy test Gonthier J. mapped out is a return, albeit indirectly, to the much reviled but never wholly abandoned "similarly situated" test with all its attendant problems.[50] This is illustrated by the fact that, in *Miron*, Gonthier J. pressed the point that "unmarried couples are not in a situation identical to married spouses with respect to mutual support obligations".[51]

Nowhere are the weaknesses of Gonthier J.'s approach clearer than in its application in La Forest J.'s judgment in *Egan*. At issue in *Egan* was the constitutionality of a provision of the *Old Age Security Act*[52] that limited to heterosexual partners (married or living common law for at least one year) the right to claim spousal allowances. These allowances are designed to alleviate the poverty of elderly couples where one spouse is over 65 and thus receiving an old age pension, the other is between the ages of 60 and 65, and the combined income of the couple falls below a statutory cut-off. James Egan and John Nesbit, having lived together since 1948 in an intimate, interdependent and committed relationship, applied for a spousal allowance when Nesbit reached age 60. The application was rejected because it was found that Nesbit was not a "spouse" as defined in the Act. Egan and Nesbit claimed that the statutory definition of "spouse" contravened section 15, as it discriminates on the basis of sexual orientation. While Egan and Nesbit ultimately lost their constitutional challenge, the Court did rule for the first time that section 15(1) protects against discrimination on the basis of sexual orientation[53] and a majority found that the

[49] *Id.*, at 443.

[50] For a detailed discussion of these problems, see Philipps and Young, "Sex, Tax, and the Charter: A Review of *Thibaudeau v. Canada*" (1995), 2 Review of Constitutional Studies 221 at 230-34.

[51] *Supra*, note 38, at 460-61.

[52] R.S.C. 1985, c. O-9, s. 2.

[53] The recognition in *Egan*, *supra*, note 37, that sexual orientation is a ground of discrimination analogous to those enumerated in s. 15 can be found in the judgments of La Forest J. at 528-29 and Cory J. at 599-603. L'Heureux-Dubé J. also concluded (at 566-67) that gays and lesbians are entitled to s. 15 protection since they "are a highly socially vulnerable group, in that they have suffered considerable historical disadvantage, stereotyping, marginalization and stigmatization within Canadian society."

legislative definition of spouse as a person of the opposite sex was discriminatory.[54]

Gay rights activists and various commentators have made much of this recognition that sexual orientation falls within the ambit of section 15 protection as an analogous ground. Yet this recognition flowed in part from the debateable assertion that sexual orientation is a fixed feature: as La Forest J. put it, "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs."[55] While recognition of sexual orientation as an analogous ground is certainly an important symbolic victory, the actual substance of the section 15 and section 1 analyses which accompany this recognition makes it possible that gay and lesbian rights cases may provide little more than rhetorical solace in Charter cases in the near future.

Justice La Forest's judgment for the four members of the section 15 minority,[56] adopting the methodology set out by Gonthier J. in *Miron*, is the clearest example of this substantive failure. This judgment, through its manipulation of context, illustrates how Gonthier J.'s analysis provides ample opportunity for the re-insertion of judicial bias — in this instance, homophobia. The remarkable character of La Forest J.'s judgment lies in its failure to recognize the harm at stake in this sort of case, all the while claiming the constitutionalization of protection against discrimination on the grounds of sexual orientation. Observable is an unfortunate alignment of judicial and legislative prejudice.

Having worked his way through the first two steps of Gonthier J.'s formula and identified a legislative distinction which results in disadvantage, La Forest J. set out to assess whether or not this distinction is a relevant one (the second aspect of Gonthier J.'s test). That is, La Forest J., sought to identify the "functional values" underlying the *Old Age Security Act*, in order to determine the relevancy of the personal characteristic at stake here — sexual orientation — to these values. What follows from this inquiry is a judicial parade of the same sort of prejudice that plagues the legislation in the first place: marriage as a fundamental institution from time immemorial,

[54] Only four judges of this majority ruled that the violation could not be saved under s. 1. Sopinka J., the fifth judge, found that the Charter infringement could be justified, with the result that the challenge was unsuccessful and the provision defining spouse remains unchanged.

[55] *Supra*, note 37, at 528.

[56] Lamer C.J., Gonthier and Major JJ. concurring.

reflecting long-standing philosophical and religious tradition, with a firm anchor in biological and social realities tied to procreation and the nurture of children.[57] La Forest J. continued, these "basic social interests and policies" are equally present in the statute's recognition of common law heterosexual relationships, but not in other relationships, including same-sex relationships.[58] Thus the legislative distinction was supported by its relevancy to the fundamental, heterosexist values of the statute. The conclusion was that legislative support of heterosexual family units is not arbitrary and is therefore legitimate under section 15.[59]

Nor does the legislation, according to La Forest J., single out same-sex couples for special, discriminatory treatment. By capturing what is of value and distinction in different sex relationships, La Forest J. effectively forestalled any discussion of other factors that might possibly reveal what is special about same-sex couples or both infertile and non-procreative different sex relationships. Also, in case anyone remains concerned about the fact that the benefit in question goes to numerous couples without children, La Forest J. cited the need to give Parliament "reasonable room to manoeuvre".[60] Such sentiments invoke La Forest J.'s traditional deference to Parliament but do so with a nasty homophobic flair.

Justices Gonthier and La Forest's use of the notion of "relevancy" was criticized by McLachlin J. in *Miron* in a treatment of section 15(1) that is likely to garner the support of a majority of the Court in the years ahead.[61] Justice McLachlin prefaced her own exposition with a discussion of the dangers of relying on relevancy as a guide to section 15(1) infringements. While allowing that the absence of relevancy between the impugned distinction and functional values of the legislation will signal discrimination, McLachlin J. recognized that the presence of relevancy decides nothing:

[57] [1995] 2 S.C.R. 513 at 535-37.

[58] A set of different reasons were given for making sense of this particular legislative distinction. The first had to do with the vulnerable position of women, the second with providing a reward for having had children.

[59] Undoubtedly, the legislation's distinctions echo these sentiments; nevertheless, this tells us nothing about the adherence of these distinctions to equality objectives.

[60] *Supra*, note 57, at 538.

[61] Justices Sopinka, Cory and Iacobucci joined her reasons, and L'Heureux-Dubé J.'s views, discussed below, are much closer to this liberal block than they are to the Gonthier/La Forest JJ. conservative minority.

> ... it does not follow from a finding that a group characteristic is relevant to the legislative aim that the legislator has employed that characteristic in a manner which does not perpetuate limitations, burdens and disadvantages in violation of s. 15(1).[62]

Rather, McLachlin J. argued, the actual impact of the distinction on members of the targeted group must be examined. Otherwise, she said, the promise of equality will not be met.[63]

But, it is not clear that McLachlin J.'s own test under section 15(1) fulfils this promise either, as she too failed to elaborate a conception of equality that is adequately attentive to both the dangers of unexplored stereotypical thinking and the effect of context on equality claims. Ignored were her own warnings about the dangers of relevancy and how it can both broaden and narrow the range of equality claims in problematic ways. The result is an application of equality theory that also fails to challenge fully traditional legislative values and that reduces the equality rubric to one that encompasses only individually based harms.

Justice McLachlin defined the purpose underlying section 15(1) as prevention of "the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on merit, capacity or circumstances".[64] Fulfilment of this purpose requires a two-step test. The first step involves an examination of whether equal protection or benefit has been denied. The second step inquires into whether such a denial constitutes discrimination.[65] This latter inquiry will usually be satisfied upon simply locating the distinction within an enumerated or analogous ground. Exceptionally, this will not be sufficient. In those cases, even though the distinction occurs along an enumerated or analogous ground, it will not violate the purpose of section 15(1).[66] This explains, McLachlin J. argued, the results in cases like *Weatherall* and *Turpin* where an enumerated or analogous ground was involved but ultimately no discrimination found.[67]

Justice McLachlin was hard pressed to account for these precedents, as in each case the equality claim was defeated at least in part because of the lack of relative disadvantage which underlay the

[62] *Miron, supra*, note 57, at 488.
[63] *Id.*, at 488-90.
[64] *Id.*, at 492.
[65] *Id.*
[66] *Id.*
[67] *Id.*, at 487.

group context of the individual complaint. Under McLachlin J.'s analysis, such a use of group context is rejected. Section 15(1) looks only to preservation of individual dignity through the prevention of imposition of group stereotypes. Enumerated and analogous grounds mark those grounds of distinction that rely on "irrelevant stereotypical group classifications".[68] Expansion of the list of recognized analogous grounds thus involves, among other things,[69] a determination of whether or not the characteristic may function as

> ... an irrelevant basis of exclusion and a denial of essential human dignity in the human rights tradition. In other words, may it serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual?[70]

In this manner McLachlin J. confirmed the abstract, individualized focus of her understanding of section 15(1) — the harm the equality claimant suffers, and which section 15(1) is to address, lies in the reduction of the individual to his or her group context.

Also confirmed was McLachlin J.'s retention of the importance of the notion of relevancy, despite her criticism of Gonthier J. on this point. While McLachlin J. would not allow a simple coherence between legislative intent and structure to defeat an equality claim, she did seem to allow that distinctions consistent with assumptions about such matters as individual merit, worth or circumstances will alone excuse possibly harmful legislative line-drawing. These criteria are contrasted to stereotypical assessments and, thus, are not suspect for McLachlin J. within the general purposes of section 15(1). Distinctions are only problematic — or "inappropriate" to use McLachlin J.'s terminology[71] — when they run counter to an individual's "true worth or entitlement".[72]

[68] *Id.*, at 495.
[69] McLachlin J. discussed the other factors previous cases have held to be important in the task of identifying analogous grounds. She allowed that such things as historical disadvantage, constitution of a "discrete and insular minority", distinction on the basis of a personal characteristic, and distinction based on an immutable characteristic might all be additional valid indicators. However, McLachlin J. cautioned that none of these factors are necessary elements of what constitutes an analogous ground. *Id.*, at 496.
[70] *Id.*, at 495.
[71] *Id.*, at 500-02.
[72] *Id.*, at 501.

> What is evil is not the ground of discrimination, but its *inappropriate use* to deny equal protection and benefit to people who are members of the marked groups —not on the basis of their true abilities or circumstance, but on the basis of the group to which they belong.[73]

So, while McLachlin J. wisely rejected Gonthier J.'s simple test of legislative relevancy, she employed the only slightly more rigorous requirement of individual relevancy: legislative distinctions must be consistent with assumptions about individual merit and circumstance. Lost is recognition of the fact that many legislative distinctions now condemned as discriminatory once conformed with traditional or dominant conceptions of merit, worth or circumstance. Justice McLachlin, thus, inserted into and legitimated within equality analysis assumptions that are most ideally challenged by equality inquiries. She employed too facile an understanding of the social construction and indeterminacy of notions of individual worth and circumstance. Her analysis lacks the important acknowledgement that, just as today's stereotypes were yesterday's truths, so too are current "appropriate" distinctions often revealable as our most insidious forms of discrimination.

We are left with L'Heureux-Dubé J.'s treatment of section 15(1) to retain the more substantive and challenging understanding of equality associated with Wilson J.'s judgments in *Andrews* and *Turpin*. Justice L'Heureux-Dubé presented what she labelled an alternative perspective to other analyses. Rather than viewing what counts as discrimination in terms of what can be generalized from the nine grounds enumerated within section 15(1), L'Heureux-Dubé J. argued for an analysis that looks to the impact of the distinction on particular groups. Such an analysis involves three steps: first, demonstration that a legislative distinction exists; second, demonstration that this distinction results in a denial of one of the four equality rights on the basis of the claimant's membership in an identifiable group and, third, demonstration that this distinction is "discriminatory".[74] A distinction that is discriminatory promotes: "... the view that an individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration."[75]

[73] *Id.*, at 500. (Emphasis in original.)
[74] *Egan, supra*, note 57, at 552.
[75] *Id.*, at 553.

Justice L'Heureux-Dubé suggested that a "subjective\objective" perspective be used in making the assessment of discrimination. This requires that the nature of the group adversely affected must be considered as well as the nature of the interest adversely affected. By considering the nature of the group adversely affected, one is able, L'Heureux-Dubé J. stated, to comprehend why action against one group will attract constitutional attention while identical action against another group will not. More vulnerable groups will be more likely to experience adverse treatment as discrimination:

> ... the more socially vulnerable the affected group and the more fundamental to our popular conception of "personhood" the characteristic which forms the basis for discrimination, the more likely that this distinction will be discriminatory.[76]

In such a manner, L'Heureux-Dubé J. provided as a focus for her analysis the individual situated within a broad social context. This understanding enabled her to explain the fact that different treatment of the sexes did not amount to discrimination in cases such as *Weatherall* and *Hess*.[77] What L'Heureux-Dubé J. most notably did do was reject the view that discrimination can be assessed absent consideration of the claimant's larger social and political environment. Also, by leaving assessment of relevancy or appropriateness to the section 1 argument, Justice L'Heureux-Dubé aptly avoided the sterility of argument which plagues Gonthier J.'s test and the complacency of assumption which characterizes McLachlin J.'s analysis.

What emerges then from this new line of equality cases are three distinctive approaches to analysis under section 15(1). Yet, eight out of the nine judges marked a turn away from the contextual individual of earlier equality jurisprudence to the more abstract individual of formal equality. Equality becomes simply a protected space for individual free choice and action, guaranteed by the law. Discarded by the large majority of justices is that vision of equality doctrine that views the equality claimant as necessarily located within a matrix of social, political, and historical group experiences. In addition, majoritarian attitudes and practices which are often experienced as exclusionary by members of marginalized groups are rendered not only legitimate by the circular logic of legislative relevance, but also, in some instances, constitutionally sacred by the rhetoric of fundamental values.

[76] *Id.*, at 555.
[77] *Id.*, at 553-54 (discussing *Weatherall*, [1993] 2 S.C.R. 872 and *R. v. Hess*, [1990] 2 S.C.R. 906.

IV. THE CHARTER AND POSITIVE RIGHTS

A review of Canadian constitutional rights and freedoms reveals very quickly that most provisions would be empty shells if they were not interpreted as placing a mix of negative and positive obligations on the state. To name but a few of the more obvious illustrations of this point, denominational school rights, language rights, aboriginal treaty rights, the right to a fair trial and the right to vote mean nothing if the state is not obliged to undertake some acts and to refrain from others. The right to vote, for example, can be denied equally effectively by state intimidation at polling booths or by simply not providing polling booths. We should avoid the half-truths of positive and negative labels, and recognize that the ideals that rights and freedoms reach for can be fulfilled best by a combination of positive and negative state acts.

However, whether particular Charter provisions place any positive obligations on the state is a question that continues to haunt Canadian constitutional law. A number of judgments released this Term dealt implicitly or explicitly with the question of the appropriate mix of positive and negative entitlements to be read into the open-ended language of the Charter. Cases dealing with participation in constitutional negotiations (*Native Women's Assn. of Canada*[78]), the right to state-funded duty counsel on arrest or detention (*Prosper*;[79] *Matheson*[80]), the extension of old age spousal benefits (*Egan*[81]), and the right to an interpreter in a criminal trial (*Tran*[82]) all raised a similar general issue: does the Charter right or freedom at issue guarantee simply negative freedom, that is, the right to be free from state interference with individual freedoms, or does the Charter also impose positive obligations on the state to extend benefits or to create the conditions necessary for the meaningful exercise of rights and freedoms by all citizens?

A purely negative definition of rights and freedoms would ensure that the Charter benefits only those individuals with the means to exercise and enforce their rights. Such a conception of rights is closely allied with the abstract individual of classical liberal theory, for the pretence of guaranteeing fundamental rights and freedoms

[78] *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627.
[79] *R. v. Prosper*, [1994] 3 S.C.R. 236.
[80] *R. v. Matheson*, [1994] 3 S.C.R. 328.
[81] [1995] 2 S.C.R. 513.
[82] *R. v. Tran*, [1994] 2 S.C.R. 951.

equally to all can only be maintained if the individual circumstances and context that may effectively hinder or block access to those rights are repressed or ignored. Incorporating positive state obligations into various Charter rights, on the other hand, entails some recognition of the connection between freedom and equality of condition in order to put Charter rights within the grasp of Canadians of all classes. Thus, a positive conception of rights is closely allied with the contextualized individual of pluralist liberal thought; a consideration of the linguistic, cultural, economic and other differences that mark individuals in society reveals the inadequacies of a purely negative conception of rights.

Consistent with the resurgence of abstract individualism in the Court's equality decisions described in the last section, a number of the Court's decisions this Term demonstrated a marked unwillingness to interpret Charter rights or freedoms as imposing positive obligations on government. In the *Native Women's Association of Canada* case (*NWAC*),[83] the Court was invited to explore the degree to which the Charter imposes obligations on government to provide funding to groups to facilitate a measure of equal participation in constitutional reform discussions. NWAC was excluded from direct funding and participation in the talks that ultimately produced the ill-fated Charlottetown Accord in 1992. Four other national aboriginal organizations did have seats at the table, and their participation was directly funded by the government. NWAC was concerned that these organizations were inadequately sensitive to sex equality issues in aboriginal communities. In particular, NWAC was more committed than the other organizations to the view that aboriginal women's interests would be better protected if the Charter applied to the exercise of power by aboriginal governments. At the Supreme Court, NWAC sought a declaration that it should have been accorded equal funding and a right to participate in the constitutional talks on the same terms as the four recipient groups.

NWAC's claim placed in issue the positive dimension of freedom of expression. This issue was also raised last Term in the *Haig* case where L'Heureux-Dubé J. observed that "[t]he traditional view ... is that the freedom of expression contained in s. 2(*b*) prohibits gags, but does not compel the distribution of megaphones."[84] Justice L'Heureux-Dubé went on to leave the door open to claims of positive

[83] *Supra*, note 78.
[84] *Haig v. Canada*, [1993] 2 S.C.R. 995 at 1035.

freedom by saying that "in the proper context" positive government action might be required to create conditions favourable to expression or to ensure access to information.[85] However, as noted in last year's review, the reasoning and result in *Haig* (rejecting the claim on the broad grounds that a matter of legislative policy was implicated) make it "hard to imagine what a 'proper context' for a court requiring the government to take positive action" might be.[86]

In *NWAC*, the Supreme Court closed the door even further on the possibility of imposing positive obligations on government to facilitate equal access to political expression and participation. The Court was unanimous in rejecting NWAC's claim. Justice Sopinka, who wrote the principal judgment for seven members of the Court, was of the view that only in "rare"[87]or "extreme"[88] circumstances will positive governmental action be required to make freedom of expression meaningful. He suggested that such circumstances would arise where the government funds organizations in a discriminatory fashion that has the effect of suppressing another group's freedom of speech.[89] Thus, positive government action, it appears, will be required only when it is necessary to remedy government-imposed negative restraints on speech. In other words, if you have not been gagged by the state, do not come to court looking for a megaphone. NWAC's claim failed, in Sopinka J.'s view, because NWAC was not deprived of an opportunity to express its views to government[90] and the evidence did not establish that the funded organizations advocated a male-dominated form of self-government.[91]

[85] *Id.*, at 1039.

[86] (1995), 6 S.C.L.R. (2d) at 100.

[87] *NWAC*, *supra*, note 78, at 657.

[88] *Id.*, at 664.

[89] *Id.*, at 655-57. Such claims, Sopinka J. stated, were preferably dealt with under s. 15. *Id.*, at 664.

[90] *Id.*, at 662.

[91] *Id.*, at 661. McLachlin and L'Heureux-Dubé JJ. wrote short concurring judgments. McLachlin J. took an even narrower view of the government's positive obligations under the Charter. In her view, governments are not subject to the Charter when choosing and funding advisors on policy matters: *id.*, at 668. L'Heureux-Dubé J. did not agree with what she saw as Sopinka J.'s narrowing of the principles she had set out in *Haig*, *supra*, note 84. Nevertheless, she agreed that NWAC's freedom of expression was not violated because it "was not prevented from expressing its views": *id.*, at 667. For further discussion of the judgments in *NWAC*, see Trakman, "The Demise of Positive Liberty? *Native Women's Association of Canada v. Canada*", (1995) 6 Constitutional Forum 71.

In sum, the *NWAC* case supports the dominant liberal view that governments are entitled to take a *laissez faire* attitude to the marketplace of ideas, even if this means that those with access to the means of communication have the capacity to drown out those who do not. Governments are also free to shape the marketplace of ideas by funding the expression of certain viewpoints, and when they do so, they face no constitutional requirement to facilitate expression of opposing viewpoints by marginalized groups, like aboriginal women, unless it can be said that state actions have had the effect of suppressing their point of view. Given that NWAC has been one of the strongest proponents of the optimistic view that the exercise of judicial power under the Charter will promote women's equality, it is more than a little ironic that members of the Court gave so little weight to the value of aboriginal women's equal access to political participation.

The Court took a similarly narrow approach to the question of positive rights in *Prosper*[92] *and Matheson*,[93] two cases dealing with the admissibility of breathalyzer evidence on impaired driving charges that arose in Nova Scotia and Prince Edward Island respectively. Both cases raised the question of whether the state has an obligation to provide free legal advice to individuals upon arrest or detention. Unlike the other eight provinces, Nova Scotia and P.E.I. did not make available duty counsel after hours to provide free legal advice to detainees. As a result, the right to counsel was illusory for those unable to afford a lawyer after hours in those provinces. Nevertheless, eight members of the Supreme Court concluded that the right to counsel in section 10(*b*) of the Charter was not breached if the state fails to provide free legal advice to indigent detainees. Chief Justice Lamer, who expressed the views of five members of the Court on this point in *Prosper*,[94] gave a number of reasons for depriving the poor of a constitutional guarantee of counsel on arrest or detention. First, he noted that section 10(*b*) does not expressly impose a positive obligation on government to provide free and immediate legal advice.[95] Second, he stated that it would be "imprudent" for the Court to fail to place weight on the fact that an amend-

[92] *Supra*, note 79.

[93] *Supra*, note 80.

[94] Sopinka, Cory and Iacobucci JJ. joined the Chief Justice's reasons, and Major J., though he dissented regarding the result, expressed his agreement with Lamer C.J.'s understanding of the right to counsel in s. 10(*b*).

[95] *Prosper*, *supra*, note 79, at 266.

ment to section 10(*b*) that would have set out such a positive obligation was rejected by the Special Joint Committee on the Constitution in 1981.[96] A decade before his judgment in *Prosper*, Lamer J. (as he then was) had suggested in the *Motor Vehicle Reference* that "care must be taken to ensure that historical materials, such as the Minutes of Proceedings of the Special Joint Committee, do not stunt [the Charter's] growth".[97] The Chief Justice of the *Prosper* case bears little resemblance to the judge who joined Wilson J. and Dickson C.J. in leading the way on the Court's adventures in liberal interpretation of the 1980s. In light of the text and legislative history of section 10 of the Charter, Lamer C.J. said:

> ... it would be a very big step for this Court to interpret the *Charter* in a manner which imposes a positive constitutional obligation on governments. The fact that such an obligation would almost certainly interfere with governments' allocation of limited resources by requiring them to spend public funds on the provision of a service is, I might add, a further consideration which weighs against this interpretation.[98]

In addition to fiscal prudence, Lamer C.J. cited the "far-reaching" practical consequences of holding governments to such an obligation as a reason for not doing so: "the logical implication", he said, "would be that all arrests and detentions are *prima facie* unconstitutional" where a duty counsel system is not in existence.[99]

While Lamer C.J. was not willing to *require* governments to provide access to state-funded duty counsel, he was willing to *encourage* them to do so. Police officers have an obligation to "hold off" from attempting to gather evidence until a detainee has had a "reasonable opportunity" to contact counsel. In the absence of duty counsel, Lamer C.J. said that the holding off period may have to be extended to enable detainees to attempt to locate counsel.[100] Thus, provinces that do not provide duty counsel may pay a price in lost opportunities to gather evidence. Indeed, this is precisely what happened in *Prosper*, as a 5:4 majority of the Court concluded that the breathalyzer evidence should be excluded because the police had not held off long enough to afford Prosper a reasonable opportunity to contact counsel.

[96] *Id.*, at 267.
[97] [1985] 2 S.C.R. 486 at 509.
[98] *Prosper*, *supra*, note 79, at 267.
[99] *Id.*, at 268.
[100] *Id.*, at 269-70.

Justice L'Heureux-Dubé, writing for three members of the Court on the section 10(*b*) issue,[101] took issue even with Lamer C.J.'s modest encouragement of state-funded duty counsel. In her view, the holding off period should not be affected by the presence or absence of duty counsel. Otherwise, she agreed with Lamer C.J. that there is no obligation on the state to provide access to duty counsel. Like the Chief Justice, she stated that whether the poor would be able to exercise the constitutional right to counsel set out in section 10(*b*) was a matter of legislative policy:

> The proper allocation of state resources is a matter for the legislature. In its choice of measures, given limited resources, a legislature may prefer to fund victims of crime rather than accused persons or vice versa — or may wish to reduce rather than increase Legal Aid funding.[102]

Justice McLachlin was left alone in expressing the view that "[t]he poor are not constitutional castaways." For her, "the *Charter* right to counsel cannot be denied to some Canadian citizens merely because their financial situation prevents them from being able to afford legal assistance."[103] She rebuked her colleagues for justifying systematic breaches of the right to counsel "on the basis that it is too difficult or too expensive to provide the means by which the right may be exercised".[104] In her judgment, section 10(*b*) is breached whenever a detainee is deprived of access to counsel for financial (or any other) reasons.

The theme of fiscal prudence that was invoked by the Court to relieve the state of an obligation to provide the means to exercise freedom of expression and the right to counsel in *NWAC* and *Prosper* surfaced again in Sopinka J.'s decisive swing judgment in *Egan*.[105] A 5:4 majority in *Egan* concluded that the *Old Age Security Act*'s exclusion of same-sex couples from entitlement to spousal allowances amounted to a discriminatory denial of the equal benefit of the law. Having found a section 15 violation, the focus of these judges then shifted to whether the government could justify the discrimination under section 1 and, if not, whether the constitutional violation should be remedied by ordering government to extend benefits to same-sex couples.

[101] Gonthier and La Forest JJ. wrote short separate judgments concurring with her views on s. 10(*b*).
[102] *Supra*, note 79, at 288.
[103] *Id.*, at 302.
[104] *Id.*, at 305.
[105] [1995] 2 S.C.R. 513.

The equality rights in section 15 of the Charter are not burdened as strongly with the label of negative rights as are, say, the fundamental freedoms in section 2. Canadian courts understand section 15 as prohibiting governments from actively discriminating and also imposing some obligations on governments to undertake positive acts to remedy discrimination. The scope of governments' positive obligations under section 15 will be determined in large measure by the Court's attitude to governments' section 1 burden of justification with respect to under-inclusive or otherwise inadequate benefit schemes (and by its willingness to remedy such defects by compelling governments to extend benefits[106]).

In keeping with the Court's narrow approach to positive rights in *NWAC* and *Prosper*, the judgment of Sopinka J. took an extraordinarily lax approach to the section 1 standard of justification in this context. In his view,

> ... the government must be accorded some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships. It is not realistic for the Court to assume that there are unlimited funds to address the needs of all.[107]

He noted that entitlement to a spousal allowance had expanded over the years, and he suggested that this incremental approach would some day lead to the inclusion of benefits for same-sex couples.[108] He concluded that Parliament's inaction to date did not disentitle it from relying on section 1, since discrimination against same-sex couples "is still generally regarded as a novel concept".[109]

Justice Sopinka was the one member of the section 15 majority who found that the violation of equality rights in this case could be upheld under section 1. Justice La Forest, writing for the other four members of the majority in the result, did not need to address section 1 having found no violation of section 15. Nevertheless, he stated in *obiter dicta* that, had he concluded that there was a section 15 violation, he would have upheld the legislation under section 1 "for the considerations set forth in my reasons in *McKinney* ... as well as for those mentioned in my discussion of discrimination in the present case."[110] The passages in *McKinney*[111] he referred to express the same

[106] On this issue, see *Schachter v. R.*, [1992] 2 S.C.R. 679.
[107] *Supra*, note 105, at 572.
[108] *Id.*, at 575.
[109] *Id.*, at 576.
[110] *Id.*, at 540.

general themes of deference to legislative incrementalism, fiscal constraints and balancing of competing interests relied on by Sopinka J.

The swing judgment of Sopinka J. is cavalier in its disregard of the government's burden of proof under section 1 and the stages of analysis set out in the *Oakes*[112] test. As Iacobucci J. pointed out, the criteria of "novelty" and "incrementalism" introduced by Sopinka J. permit "s. 1 to be used in an unduly deferential manner well beyond anything found in the prior jurisprudence of this Court".[113] Missing is the Court's usual insistence that governments provide evidence that demonstrates the need to violate Charter rights in order to achieve other objectives. The *McKinney* case, dealing with mandatory retirement, was previously the high-water mark of judicial deference under section 1. In that case, there was a plausible argument that governments should be given reasonable leeway when they have made *bona fide* attempts to balance the equality rights of elderly workers against the interests of younger workers and employers. However, it is disingenuous to suggest in *Egan*, as La Forest and Sopinka JJ. did by citing *McKinney*, that the government had decided to exclude same-sex couples after considering their needs and balancing the costs of their inclusion against competing claims. In fact, a review of the legislative and committee debates on the spousal allowance since its introduction in 1975 reveals no mention of the needs of same-sex couples whatsoever.

The highly deferential approach taken to the issue of justification by the section 1 majority in *Egan* gives lower courts, if they are so inclined, the freedom to absolve governments of any meaningful standard of justification for discriminatory social benefit schemes. This result will have the effect of further discouraging already risky and costly litigation that seeks to employ section 15 to impose obligations on government to extend social programmes to the benefit of disadvantaged groups.[114]

While the positive rights claims in *Egan*, *Prosper* and *NWAC* encountered an unreceptive Court, the justices' approach to the positive rights dimension of the Charter was not uniformly unfavourable

[111] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 316-18.
[112] *R. v. Oakes*, [1986] 1 S.C.R. 103.
[113] *Supra*, note 105, at 619.
[114] See Duclos and Roach, "Constitutional Remedies as 'Constitutional Hints': A Comment on *R. v. Schachter*" (1991), 36 McGill L.J. 1.

this Term. In *Tran*[115] the Court took a broad and sensitive approach to the state's positive obligation to provide interpreters to accused persons in criminal trials. The *Tran* case afforded the Court its first opportunity to interpret the scope of the right to the assistance of an interpreter set out in section 14 of the Charter. Chief Justice Lamer, on behalf of a unanimous Court, wrote an opinion that, in its clarity and commitment to large, liberal principles of interpretation, reads like a mid-1980s Dickson Court judgment.

The Chief Justice began by noting that the common law had not always been supportive of an accused's need for the assistance of an interpreter. In fact, Canadian courts early in this century tended to reject a positive conception of the right to an interpreter for the very same reasons invoked by the current Court to reject positive conceptions of rights in the cases discussed above, namely, fiscal prudence and impracticality.[116]

The common law has since evolved to the position that an accused in a criminal trial with an inadequate grasp of the language of the proceedings has a right to a state-funded interpreter.[117] Chief Justice Lamer summarized the current state of the law as follows:

> ... a person facing criminal charges who does not speak or understand the court's language has the right under the common law to be provided with an interpreter. The right to interpreter assistance is a means of ensuring that proceedings are fair and comply with the basic principles of natural justice.[118]

The right must be recognized "even where this causes inconvenience or takes up additional time".[119]

The issue in *Tran* was the adequacy and continuity of the interpretation provided to the accused at trial. The funding of interpreters was not at issue, and Lamer C.J. took care to avoid any reference to the issue. However, he appeared to take for granted that all aspects of the common law right now have constitutional status. Moreover,

[115] [1994] 2 S.C.R. 951.

[116] See, *e.g.*, *R. v. Meceklette* (1909), 15 C.C.C. 17 at 19; *R. v. Sylvester* (1912), 19 C.C.C. 302 at 306-07.

[117] The leading case is *R. v. Lee Kun*, [1916] 1 K.B. 337 (C.A.). See Steele, "Court Interpreters in Canadian Criminal Law" (1992), 34 C.L.Q. 218 for a review of the case law.

[118] *Tran*, *supra*, note 115, at 967.

[119] *Id.*, at 966.

the generous tone of his judgment suggests that there is little risk that the Charter will be interpreted to permit the denial of an interpreter at trial to an indigent accused. Throughout, and in sharp contrast to his judgment in *Prosper* regarding the right to counsel on arrest or detention, Lamer C.J. assumed without discussion that section 14 of the Charter imposes positive obligations on government. He summarized the scope of the constitutional right to an interpreter as follows:

> The constitutionally guaranteed standard of interpretation is not one of perfection; however, it is one of continuity, precision, impartiality, competency and contemporaneousness. An accused who does not understand and/or speak the language of the proceedings, be it English or French, has the right at every point in the proceedings in which the case is being advanced to receive interpretation which meets this basic standard.[120]

How are we to understand the Court's untroubled, even welcoming, adoption of a positive rights conception of section 14 in light of the anxiety and resistance that greeted the positive claims made under sections 2(*b*), 10(*b*) and 15 in *NWAC*, *Prosper* and *Egan* respectively? One obvious lesson to draw is that despite the Court's assertion in *Dagenais* that there is no hierarchy of Charter rights,[121] it does appear that some rights are more positive than others. While all rights are fulfilled ideally by a mix of positive and negative state obligations, the Court's commitment to this ideal wavers. One reason for this may be that the notion of Charter rights and freedoms equally available to all, and the mythic abstract individual on which it relies, is serviceable in some contexts and demonstrably false in others. The guarantee of negative freedoms without the positive means of exercising them is not likely to be countenanced where it would produce highly visible absurdities or injustices. As Lamer C.J. commented in *Tran*, an interpreter is necessary to ensure that "no person should be subject to a Kafkaesque trial which may result in loss of liberty."[122] In short, the myth of the abstract individual may support purely negative conceptions of rights in the marketplace of ideas, upon arrest or detention, or in the distribution of economic

[120] *Id.*, at 998.

[121] *Canadian Broadcasting Corp. v. Dagenais*, [1994] 3 S.C.R. 835 at 877.

[122] *Tran*, *supra*, note 115, at 975.

resources, but it cannot withstand the harsh glare of the criminal trial process.[123]

V. THE FAMILY

While the shift to the conceptualization of the bearer of Charter rights as liberalism's unencumbered individual is clear in the equality cases discussed in Part III, and implicit in the positive rights cases just discussed, it becomes considerably less straightforward in the cases we will examine in the next two sections. The currency of discourse is still abstract individualism, but the Court signals through its framing of the issues and their resolutions a more textured set of assumptions about what is, in its eyes, really at stake. The results reveal a constellation of assumptions about proper social and moral ordering accompanying an understanding of the individual as self-determined and freely choosing. Created is one of the more distinctive confluences of imagery in recent Supreme Court jurisprudence.

Nowhere is this pairing of abstract individualism and moral conservatism more marked than in those cases that deal with family issues. To illustrate this, we look at *Egan*[124] *and Thibaudeau*,[125] both cases where equality claims about the distribution of resources, either within or to families, were at issue. In these cases, the claimants, members of specific and disadvantaged groups, were unable to access equality rights because of the Court's failure to recognize the value and distinctiveness of the family form in which the claimants found themselves. Also, while a majority of the Court was quick to assert initially the values of individual autonomy, choice, and equality, these values remain only formally guaranteed when the claim-

[123] Indeed, in *Prosper*, [1994] 3 S.C.R. 236, both Lamer C.J. (at 266, 274) and L'Heureux-Dubé J. (at 288) were careful to make clear that they may well take a different approach to the state's duty to provide counsel where the right to a fair trial is at stake. When it is given the opportunity, the Court will likely affirm the Ontario Court of Appeal's position that the state has a constitutional duty (under ss. 7 and 11(*d*) of the Charter) to provide counsel to an indigent accused whenever legal representation is necessary to a fair trial: see *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1. For more on the right to state-funded counsel, see Schneiderman and Graydon, "An Appeal to Justice: Publicly Funded Appeals and *R. v. Robinson*; *R. v. Dolejs*" (1990), 28 Alta. L. Rev. 873 and Moon, "The Constitutional Right to State-Funded Counsel on Appeal" (1989), 14 Queen's L.J. 171.

[124] [1995] 2 S.C.R. 513.

[125] [1995] 2 S.C.R. 627.

ants' choices undermine or threaten mainstream assumptions about family structure and roles.

Thibaudeau provides the starkest example of the sacrifice of individuality in favour of traditional patriarchal familial ordering. At issue was the *Income Tax Act* requirement that child support payments received by a custodial parent be taxed in the hands of the recipient, while payor parents are granted a tax deduction (the "inclusion/deduction scheme").[126] Suzanne Thibaudeau challenged as contrary to section 15(1) of the Charter the statutory requirement that child maintenance payments be included in the custodial parents' income. The five majority judges were united by their finding that the legislative scheme imposed no burden on custodial parents. Justices L'Heureux-Dubé and McLachlin wrote separate dissents, both finding an unjustifiable infringement of section 15(1).

The majority judgments are most remarkable for their finding that the *Income Tax Act* provisions do not even trigger section 15 protections. That the judges failed to identify Thibaudeau's case as raising any equality problems, even initially, is astonishing. It illustrates that hard lesson: constitutional doctrine can always be finessed by judicial ideology (here familial and gender ideology). It did not matter that the majority judgments were animated by diverse understandings of discrimination. The justices' refusal to disaggregate divorced or separated women from their former spouses, to peer within the family unit — even the post-divorce family "unit" — and look to individual equality, meant that *any* equality analysis was doomed. For Gonthier J., it was enough that the "tax burden on the *couple* is reduced"[127] and that therefore the "impugned system provides an overall benefit to couples supporting children".[128] Justices Cory and Iacobucci similarly insisted that "the divorced parents still function as a unit". "If anything", they wrote, "the legislation in question confers a benefit on the post-divorce 'family unit'."[129] The fact that in practice the scheme automatically benefits payors, and frequently (as in Thibaudeau's situation) makes recipients worse off,[130] was not addressed by the majority, as the distribution of

[126] *Income Tax Act*, R.S.C. 1970-71-72, c. 63, ss. 56(1)(*b*) and 60(*b*).

[127] *Supra*, note 125, at 692. (Emphasis in original.)

[128] *Id.*, at 695.

[129] *Id.*, at 702.

[130] For a discussion of the practical and economic consequences of the inclusion/deduction scheme, see Philipps and Young, "Sex, Tax, and the Charter: A Review of *Thibaudeau v. Canada*" (1995), 2 Review of Constitutional Studies 221, at 270-300.

the benefit between the members of the "couple" was considered to be irrelevant. In other words, whether or not the inclusion/deduction scheme is implicated in the well-documented gendered disparity in wealth following divorce was a question the majority considered to be outside the scope of Charter equality concerns.

Not surprisingly, the two women on the Court were sharply critical of the majority's approach and its consequences. As McLachlin J. put it: "Where unequal treatment of one individual as compared with another is established, it is no answer to the inequality to say that a social unit of which the individual is a member has, viewed globally, been fairly treated."[131]

The majority's assertion of family solidarity, even in the face of divorce and separation, appears to challenge the primacy of the "autonomous freely choosing individual" as rights bearer. However, from another perspective, it simply reinforces this ideal, as ultimately the Court, because it cannot find this autonomous individual in these cases, found no breach of the Charter. Had the Court been more sensitive to the notion of "individual in context" (a competing image), perhaps Suzanne Thibaudeau would have emerged as a rights holder. Comprehending Ms. Thibaudeau's circumstances demands an appreciation of how her economic status is both separate from and still connected to that of her ex-husband. It involves an appreciation of how such circumstances raise issues unique to women in their roles as primary caregivers to their children.

This case, ironically, reminds us of the revolutionary impact of liberal individuality on status relations: without it, women are rendered invisible within the family unit — however such a unit is conceived. Here, conflation of a woman's economic circumstances with those of the nearest man ensures that women are granted no economic individuality. This perpetrates both a simplistic patriarchal picture of the world and a blindness to the ways individuality necessarily occurs in a complex social reality. Thus, the majority decisions in *Thibaudeau* combine a conservative and sexist picture of family relations with a rigid refusal to recognize individuality as it is contoured by social and legal associations. Given the overwhelming gendered nature of the impact of the tax provisions under challenge,[132] the practical consequences of these postures in *Thibaudeau* represent a significant setback for women's citizenship struggles, at both

[131] *Supra*, note 125, at 716. L'Heureux-Dubé J. made the same point, *id.*, at 644.

[132] See generally Philipps and Young, *supra*, note 130.

the symbolic and material levels.

From a more doctrinal perspective, the Court's manipulation of stakeholders in this case — moving from individual men and women to family units encompassing both of the separated parents — illustrates the tremendous flexibility with respect to group identification that equality theory inevitably grants. As a comparative concept, equality demands that units of comparison be established.[133] Such a process is unavoidably indeterminate and therefore subject to an infusion of judicial biases. It can operate either to locate or diminish the claimant's statement of harm. In *Miron*, L'Heureux-Dubé J. recognized the sensitivity of this aspect of an equality inquiry when she noted that "uncritical comparison of dissimilar groups can undermine the purposes of s. 15 of the *Charter* rather than further them".[134] In *Thibaudeau* there is a double manipulation of this notion of group membership: Suzanne Thibaudeau becomes representative not of a group of individuals but of a group of groups (divorced families). This again illustrates the Court's use of a particular status relation to render irrelevant the Charter's protections of autonomous individuality.

Similar assumptions about proper familial ordering and the manipulation of comparator groups can be observed in the Court's consideration of state allocation of economic benefits between various kinds of families in *Egan* and *Miron*. The fundamental point of contention in these two cases was whether section 15 of the Charter prohibits the state from continuing to legislate a three-tiered hierarchy of intimate relationships, with married spouses favoured over unmarried heterosexual spouses and both favoured over gay or lesbian spouses. As discussed above, a 5:4 majority rejected Egan's and Nesbit's challenge to the exclusion of gay and lesbian couples from entitlement to spousal allowances under the *Old Age Security Act*. In *Miron*, on the other hand, a 5:4 majority held that the Ontario government had discriminated against unmarried heterosexual couples by denying them accident benefits in standard automobile insurance contracts which married couples could claim.

The Court held for the first time in these two cases that sexual

[133] In *Andrews*, [1989] 1 S.C.R. 143 at 164 McIntyre J. stated: "[E]quality is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises." For a discussion of this point, see Philipps and Young, *supra*, note 130, at 261-70.

[134] [1995] 2 S.C.R. 418, at 467.

orientation and marital status are grounds of discrimination analogous to those enumerated in section 15. Despite this holding, the four judges making up a minority on the section 15 issue, led by Gonthier and La Forest JJ., defended the status quo from the challenge of anti-discrimination law. They stated that "Parliament may quite properly give special support to the institution of marriage" because of "the biological and social realities that heterosexual couples have the unique ability to procreate".[135] In their view, the laws at issue that denied benefits to either same-sex couples (*Egan*) or all unmarried couples (*Miron*) were not discriminatory since the exclusions were relevant to the state's goal of supporting marriage.

The other five judges rejected the circular reasoning of their colleagues. In their view, laws that favour a category of spouse defined by reference to marital status or sexual orientation are discriminatory. Justice McLachlin wrote in *Miron* that the state must respect "a matter of defining importance to individuals", namely, "the individual's freedom to live life with the mate of one's choice in the fashion of one's choice".[136] Justice Cory in *Egan* noted that the exclusion of same-sex couples from benefits reserved for spouses "reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples".[137] It followed, in Iacobucci J.'s words, that "differential treatment between married and common law spouses is constitutionally suspect" as is "differential treatment of relationships based on sexual orientation".[138] In the result, five judges were willing to use section 15 of the Charter to broaden the legal definition of spouse to include common law couples in *Miron* and four judges reached the same result for same-sex couples in *Egan*.

As discussed in Part IV above, Sopinka J. broke ranks with his liberal colleagues in *Egan* at the second stage of Charter analysis, namely, the question of whether the government's violation of Egan's equality rights could be justified as a reasonable limit pursuant to section 1. In *Miron*, on the other hand, Sopinka J. agreed with McLachlin J.'s conclusion on the section 1 analysis that marital status was not a "reasonably relevant marker" of who should be entitled

[135] *Egan*, *supra*, note 124, at 536 per La Forest J.
[136] *Miron*, *supra*, note 134, at 497.
[137] *Egan*, *supra*, note 124, at 604.
[138] *Id.*, at 610-11.

to automobile accident benefits.[139] Justice Sopinka was thus willing to demand that legislatures broaden legislative definitions of family to include unmarried couples so long as they were heterosexual.

Most of the legal differences between married and unmarried heterosexual couples have been erased by legislative reforms over the course of the last 25 years. However, some important differences remain.[140] For example, property rights in provincial family law legislation can be invoked only by marriage partners. The reasoning in *Miron* suggests that Charter challenges to these remaining legal differences may succeed, perhaps ultimately obliterating any legal distinctions between marriage and "living in sin".

In contrast, the differences in the current legal treatment of same-sex couples and heterosexual couples are legion. With few exceptions, Canadian legislatures have chosen not to recognize gay or lesbian relationships. When confronted with the broad agenda of law reform potentially provoked by the encounter between section 15 and the legislative status quo, Sopinka J. balked. The government, he said, "does not have to be pro-active in recognizing new social relationships".[141] Thus, not only is it no longer necessary to be a member of a marginalized group to benefit from section 15's protection, but, if a group is too marginalized, its members may have difficulty benefiting from section 15 at all.

The immediate impact of *Egan* has been to shift Charter claims by same-sex spouses from the section 15 frying pan to the section 1 fire. The majority judgments on section 15 provide strong support for the view that a wide range of laws or practices that disadvantage lesbian and gay couples relative to their heterosexual counterparts will be found to be discriminatory. However, the reasoning of the section 1 majority in *Egan* has virtually ensured that we will continue to witness the spectacle of courts and legislatures passing the law reform buck to each other in the coming years. The burden of law reform remains where it has been, namely, on lesbian and gay litigants.

Their success in one area seems assured in light of the 5:4 majority that found the spousal definition at issue in *Egan* to be discriminatory: human rights tribunals in most jurisdictions will likely issue rulings making clear that it is illegal to deprive gay and lesbian

[139] *Miron*, *supra*, note 134, at 507.
[140] See Cossman and Ryder, *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms* (Ontario Law Reform Commission, 1993).
[141] *Egan*, *supra*, note 124, at 572.

employees of employment benefits that can be claimed by their heterosexual colleagues.[142] A growing number of public and private employers now extend benefits to same-sex couples. Recalcitrant employers will find that, in most jurisdictions, the *Egan* case will effectively force them to do so since, with the exception of Nova Scotia, a section 1-like escape hatch is not available to parties seeking to justify discrimination that is challenged under human rights legislation.[143]

On the other hand, the success of Charter challenges by gay or lesbian couples to discriminatory legislation is likely to be halting and unpredictable as some judges are likely to follow, and others to distinguish, the unprincipled approach Sopinka J. took to section 1 in *Egan*.[144] This result reminds us of the theme highlighted in last year's review, namely, the justices' "desire not to step outside the boundaries of what they perceive to be the 'social consensus' or 'dominant views' in Canadian society".[145] Perhaps what Sopinka J. is

[142] See *Vogel v. Manitoba*, [1995] M.J. No. 235 (Man. C.A.). Chris Vogel had been seeking legal recognition of his gay relationship for over 20 years with no success until this ruling. The Manitoba Court of Appeal overturned an adjudicator's dismissal of Vogel's most recent human rights complaint. Phelp J.A., despite his obvious sympathies with the views of La Forest J., wrote that, following *Egan*, "this Court is bound to conclude that the denial of spousal benefits under Mr. Vogel's employment benefit plans to his same-sex partner is the result of their sexual orientation, and is, therefore, discriminatory treatment under the Code."

[143] The Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214, has a saving provision that reproduces the exact language of s. 1 of the Charter: s. 6(*f*)(ii). The laws in Alberta and the Yukon contain "reasonable limit" exceptions to the prohibitions on discrimination: *Individual's Rights Protection Act*, R.S.A. 1980, c. A-16, s. 11.1 ("reasonable and justifiable in the circumstances"); *Human Rights Act*, S.Y. 1987, c. 11, s. 9(*d*) ("reasonable cause"). In Alberta, whether a complaint can be brought at all depends on whether a court ruling reading in "sexual orientation" as a prohibited ground of discrimination is affirmed on appeal: see *Vriend v. Alberta* (1994), 152 A.R. 1 (Q.B.). The Manitoba *Human Rights Code*, S.M. 1987-88, c. H175, ss. 13(1), 14(6), 15(1), excuses some kinds of discrimination if "bona fide and reasonable cause" can be established. In all other jurisdictions, there is nothing approaching a s.1 equivalent.

[144] See, *e.g.*, *Rosenberg v. Canada*, [1995] O.J. No. 2531 (Ont.Gen.Div.), a Charter challenge to s. 252(4) of the *Income Tax Act*. This section prevents the registration of a pension plan for the purposes of obtaining a tax deferral on contributions if the plan extends spousal survivor benefits to same-sex couples. After finding a violation of s. 15, rather than asking whether the government had discharged its burden of proof under the various stages of the *Oakes* test, Charron J. characterized the issue as whether "the case at bar can be distinguished from the decision in *Egan and Nesbit*." In her view, it could not because there was "no meaningful distinction" between "the denial of a direct cash outlay by way of benefit as opposed to the benefit in question in this case, the tax deferral which flows from the registration of a pension plan".

[145] Bakan *et al.*, "Developments in Constitutional Law: The 1993-94 Term" (1995), 6 S.C.L.R. (2d) 67 at 68.

really saying is that there is not yet a sufficient public consensus on the full recognition of gay and lesbian rights, particularly when it comes to expanding legislative definitions of family, and for the Court to lead the way into a new era would be to risk too great an assault on the fragile legitimacy of judicial review. Yet, a selective refusal to assume the full mantle of legislative review itself threatens the legitimacy of the process. This is particularly so if the Court's courage falters exactly when called upon by the vulnerable minorities whose protection from majoritarian neglect arguably justifies this exercise of judicial power in the first place.

Justice Sopinka's last-minute denial of protection to gay and lesbian couples echoes similar ideological feints in the majority decisions in *Thibaudeau* and the minority reasons in *Miron*. Abstract individualism — with its prioritizing and protection of individual choice and freedom — becomes less sacrosanct when such individualism runs counter to cherished notions of familial ordering. Individual freedom then becomes tempered by the restraints of conservative ideals of social structuring.

VI. Parental Liberty, Religious Community and Medical Expertise

In this next section, we continue to explore the linkage of abstract individualism with conservative assumptions about proper moral orderings and choice — here, religious ones. In *B.(R.) v. Children's Aid Society of Metropolitan Toronto*,[146] the individual of the equality cases emerges dominant yet again, but at the same time the choices such an individual makes or the freedom such an individual might enjoy are very much shaped by dominant religious ideals. Thus, we are presented again with the peculiar convergence of a formally neutral and abstract vision of the individual, denatured of any social or political context, and the application of Charter protections so as to enshrine only a very selective vision of the religious good life.

The *B.(R.)* case brought together a number of the elements which make up the increasingly focused neo-conservatism of the Court's jurisprudence. *B.(R.)* concerned Jehovah's Witness parents, Beena and Richard B., whose infant child, Sheena B., was apprehended

[146] [1995] 1 S.C.R. 315.

when they refused to consent to a blood transfusion recommended by a physician. At the initial hearing, the presiding judge accepted medical evidence that Sheena B. might require a transfusion on short notice to treat congestive heart failure and granted a 72-hour wardship order to the Ontario Children's Aid Society (C.A.S.). At a subsequent hearing, the order was extended for 21 days. At this second hearing, C.A.S. witnesses testified that Sheena B. was still at risk from congestive heart failure and, additionally, was in need of exploratory surgery for possible infant glaucoma. Sheena B. received a blood transfusion two days later in the course of exploratory surgery. A few weeks later, wardship was terminated and Sheena B. was returned to her parents.

The parents framed their objections to the apprehension in terms of two constitutional arguments. The first was that section 7 liberty extends to parental liberty and their rights in this regard had been violated in a manner inconsistent with the principles of fundamental justice. They pointed to two violations of fundamental justice: the failure of C.A.S. to disclose that it had obtained a medical opinion on the day of the first hearing which rejected the diagnosis of a congestive heart condition, and the failure of C.A.S. to give notice of the infant glaucoma argument advanced at the second hearing. The second constitutional argument made by the parents was based on the protection of freedom of religion in section 2(*a*) of the Charter. Again, the parents' main concerns related to the process by which the authorities determined the legality of the apprehension. The B.'s argued that section 1 of the Charter requires a very high standard of medical necessity before parents' religious objections to medical treatment for their infant children can be set aside. Indeed, the parents argued that where medical opinion is divided, the Court should defer to the parents' wishes. The Court was unanimous in dismissing both the section 2(*a*) and section 7 challenges to the legislative scheme.

1. Section 7, Parental Liberty and the Individual

The Court used the *B.(R.)* case to explore the key issue of the scope of section 7 liberty and of the fundamental freedoms in section 2. This is significant as section 7 has been given very little consideration outside the penal and criminal context. Thus the question of whether liberty means more than simply the physical liberty of the individual has never been addressed fully except by Wilson J. In previous cases, Wilson J., writing alone, had extended section 7 liberty to concerns about the rights of parents to determine the upbringing of their children[147] and the rights of women to make reproductive decisions.[148] In *B.(R.)*, Lamer C.J. argued that section 7 liberty is limited to "the physical dimension of the word 'liberty' which can be lost through the operation of the legal system."[149] The Chief Justice made it clear that his interpretation would, for the most part, limit section 7 to challenges to the criminal and penal justice system.[150] However, Lamer C.J.'s reasons garnered no explicit support. Although Sopinka J. found it unnecessary to decide whether a liberty interest was engaged,[151] and Iacobucci, Major and Cory JJ. also preferred to leave the issue for another day,[152] the remaining four members of the Court were willing to extend section 7 liberty rights to interests other than physical liberty and, in particular, to "the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care".[153]

The Court also split on the second issue pertaining to the scope of section 7, namely, whether the liberty of the individual should be considered in isolation from or in the context of other individuals who have conflicting constitutional claims. In *B.(R.)*, the question took the form of whether the B.'s parental rights should be qualified by their child Sheena's section 7 rights to life and security of the person. Neither Lamer C.J. nor Sopinka J. expressed views on this issue. Justice La Forest espoused the "isolated" view for a plurality of four judges while Iacobucci and Major JJ. (with whom Cory J. concurred) wrote reasons in favour of the "contextual" view. When the issue was addressed with respect to section 2(*a*), La Forest J.'s "isolated" view obtained the agreement of Sopinka J. to form a majority of five while Iacobucci and Major JJ.'s "contextual" view obtained the agreement of Lamer C.J. to constitute, with Cory J., a minority of four.

Underlying the Court's uncertainty over whether to analyze a rights claim in isolation or in the context of other possibly conflicting

---

[147] *R. v. Jones*, [1986] 2 S.C.R. 294.

[148] *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

[149] *Supra*, note 146, at 341.

[150] *Id.*

[151] *Id.*, at 428.

[152] *Id.*, at 431, 434.

[153] *Id.*, at 370 per La Forest J. (Gonthier and McLachlin JJ. concurring). L'Heureux-Dubé J. wrote a separate judgment concurring with La Forest J. on the substantive issues: *id.*, at 392.

constitutional rights claims lies a fundamental disagreement over the nature of the individual holder of Charter rights. Justice La Forest's "isolated" view portrays the individual in a fashion associated with classical liberalism, namely, as an abstract agent whose happiness consists of the unimpeded pursuit of subjectively defined preferences. The constitutionally protected freedoms and liberties accorded this individual, therefore, must be at least presumptively unqualified by any consideration for the relational dimension of individual selfhood, even when the text of the Constitution itself would seem to demand acknowledgement of a more complex and interconnected social landscape. This construction of the individual has already become the norm in the freedom of expression cases. In *B.(R.)*, La Forest J. extended this analytic approach to the delineation of section 7 liberty and to section 2(*a*) freedom of religion. In doing so, he clearly identified the political vision which inspires what might otherwise seem an arid distinction. He wrote firmly and vigorously of the "fundamental importance of choice and autonomy in our society",[154] and asserted that the interest protected by section 7 liberty in the *B.(R.)* case is not a right to family integrity but an individual right of the parent which inheres in the broader value of individual privacy. He then sketched out a notion of privacy which cast it solely in terms of the opposition between the private sphere of individual freedom and the public sphere of state intervention.

The more contextualized portrait of the individual advanced in the reasons of Iacobucci and Major JJ. places the individual alongside other rights holders. While this is by no means a radical departure from liberal individualism, it at least acknowledges that persons lead their lives within a social setting. It allows the possibility of providing a more textured account of rights in terms of harmful impacts on the constitutional rights of other individuals. Thus, at a minimum, parental liberty can be given a meaning that incorporates the obviously relational nature of parenting rather than casting children as potentially hostile interests which might provide, either reasonably or unreasonably, a basis for the state to constrain parenting choices.

It is interesting to compare the split over the "isolated" versus "contextual" view in *B.(R.)* with the analysis of section 7 in *Rodriguez v. British Columbia (Attorney General)*.[155] In the latter case, the majority reasons by Sopinka J. asserted that an individual's claim to

[154] *Id.*, at 372.
[155] [1993] 3 S.C.R. 519.

section 7 liberty and security of the person "cannot be divorced from the sanctity of life, which is one of the three Charter values protected by section 7".[156] This would seem to contradict the view espoused by La Forest J. in *B.(R.)*. However, in *Rodriguez*, the conflict is not between the individual claimant and other rights holders but between different dimensions of the individual's own constitutional status as a full member of the political community. The majority in *Rodriguez* was willing to try to make a coherent whole out of the array of constitutional claims available to the individual, or, at least, out of those available in relation to the three values presented as a single protection in section 7. The isolated individual remains at the centre of the analysis. By way of contrast, the approach of Iacobucci and Major JJ. in *B.(R.)* strives to make a coherent whole out of the array of claims available to the individual in relation to other individuals with equally important but possibly conflicting claims. The extent to which La Forest J.'s "isolated" view of the individual in *B.(R.)* appears to contradict at least the spirit of Sopinka J.'s majority reasons in *Rodriguez* perhaps explains Sopinka J.'s perplexing silence on the issue in *B.(R.)*.

2. Section 2(a) and Religious Community

As noted earlier, the same debate over an "isolated" versus "contextual" approach to defining rights arises with respect to freedom of religion. The plurality support for La Forest J.'s "isolated" view became the majority with the addition of Sopinka J. This is consistent with previous cases on the ambit of both freedom of religion and freedom of expression. Indeed, the Court's analysis of the fundamental freedoms has always been firmly grounded in the view that rights protect negatively described spheres of individual autonomy and expression. Any resolution of the tension between this abstract negative understanding of individual freedom and the constitutional interests of other individuals or groups has been relegated to section 1 of the Charter. The majority in *B.(R.)* adhered to this pattern by finding that the constitutionally protected parental freedom to control the religious education of children is presumptively unconstrained by the health and well being of those children.

By shifting any account of the particular social and historical meanings of religious freedom to the section 1 stage of analysis, the

[156] *Id.*, at 584.

importance of nurturing diverse religious communities in a complex, multifaceted and pluralist society is, ironically, diminished and demeaned rather than given pride of place as a fundamental value. The consequence of the focus on the reasonableness of the state's interference with individual freedom is that the B.'s and others who, for religious reasons, deviate from mainstream norms of appropriate child rearing are inevitably portrayed as unreasonable, as parents who would selfishly insist that their own choices and desires prevail over the health and survival of their children. In the dramatic struggle between the wilful rights holding individual and the potentially overbearing state, there is no structured opportunity for the B.'s to present an account of how, in fact, their particular religious or cultural community provides for the well being of its children. Disappeared are the specific contours of the communities within which individuals live, worship, pray and care for their children.

As Shauna Van Praagh has noted, religious communities function as quasi-publics within liberalism's traditional private sphere.[157] Van Praagh characterizes religious communities as "self-perceived, small normative universes coexisting with the larger normative structure of the state".[158] She points out that often communities' "authoritative structures ... address many details of internal family life, and the law's commitment to certain policies with respect to the family may be experienced as an attack on the self defined jurisdiction of those communities".[159] Thus, a rigidly binary account of politics prevents the development of a framework which can meaningfully accommodate cultural and religious differences.

The now orthodox structure of analysis under section 2 of the Charter, with its emphasis on the section 1 justification for state interference in negatively drawn spheres of freedom, also erases the specific dimensions of children's experiences of religious community from consideration. Van Praagh is careful to identify both the positive and negative potential of children's relations to religious authority and the way in which the subsuming of children's complex and unique interests within those of the parents distorts and limits the creative and remedial potential of law.[160] In *B.(R.)*,

[157] See Van Praagh, "The Youngest Members: Harm to Children and the Role of Religious Communities" in Fineman (ed.), *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (1994), at 149.

[158] *Id.*, at 152.

[159] *Id.*

[160] *Id.*, at 164.

this latter phenomenon is starkly evident in La Forest J.'s dismissal of the notion that Sheena B. has any religious interests at stake on the grounds that "a child must be old enough to entertain some religious beliefs in order to do so"[161] and in the paucity of the remedial options considered by the decision makers, namely, either to place Sheena B. under the care and control of the state or to leave her under the care and control of her parents. In sum, in *B.(R.)* religious beliefs are constructed as individually expressed preferences in an open market of differently packaged spiritual practices. While this preserves the appearance of liberal tolerance, it does not bode well for the larger project of creating a jurisprudence which addresses rather than avoids issues of cultural conflict in a pluralist society.

3. Fundamental Justice and Reasonable Limits: Legal Scrutiny of Medical Expertise and Authority

As discussed above, the Court casts the *B.(R.)* case primarily in terms of the "big" issue of state intervention in the private sphere of individual familial and religious choices. On those simplistic terms, it is an easy case. As La Forest J. noted, even the parents agreed that, in general, the state should intervene to protect children.[162] However, as Martha Minow has noted, by focusing on *whether* the state should intervene, courts, commentators and policy makers sidestep the more complex and difficult issue of *how* the state should intervene.[163] This is a particularly salient observation in *B.(R.)* for it is the "how" of state intervention which is the core of the parents' claim. In particular, the B.'s are critical of the power wielded by medical and health care professionals in determining the legality of the apprehension. The focus of this aspect of the parents' complaint is the legislative definition of a child in need of protection which provides the legal basis for an apprehension. The definition states, in part, that a child is in need of protection

> ... where the person in whose charge the child is neglects or refuses to provide or obtain proper medical, surgical or other recognized remedial care or treatment necessary for the child's health or well-being, or refuses

[161] *Supra*, note 146, at 381.

[162] *Id.*, at 375.

[163] Minow, "Beyond State Intervention in the Family: For Baby Jane Doe" (1984/85), 18 U. Mich. J. Law Ref. 933, at 953.

> to permit such care or treatment to be supplied to the child when it is recommended by a legally qualified practitioner ...[164]

In the course of the litigation leading up to the appeal to the Supreme Court of Canada, the parents argued that the legislative standard contained in the definition improperly delegates the power to decide if a child is in need of protection to a doctor rather than a judge. This claim was rejected by both Whealy Dist. Ct. J., and Tarnopolsky J.A. for the majority at the Court of Appeal. Unfortunately, the underlying issue of the infusion of medical standards into legal criteria and the extensive reliance of the state on medical expertise and knowledge was never again fully addressed.

At the Supreme Court of Canada, in order to get at the "how" issue, in particular the nexus between medical authority and legal standards, the parents had to fit their claims into the strictures of an argument based on a breach of fundamental justice or on the state's failure to reasonably limit rights under section 1. To a certain extent this worked well. The parents' complaints regarding the C.A.S.' failure to disclose contradictory medical evidence and the C.A.S.' failure to give notice of the infant glaucoma argument are exactly what is contemplated by the procedural fairness aspect of fundamental justice in section 7. However, in the face of the parents' argument that the seriousness of the core value of parental liberty should require stringent procedural protections and a high standard of medical necessity combined with a lack of treatment alternatives before an apprehension is found to conform to fundamental justice principles, La Forest J. asserted that section 7 simply sets a minimum threshold of fairness rather than guaranteeing "the most equitable process of all".[165] In his view, the outline of the process in the legislation possessed all the earmarks of a procedurally just regime: a standard of necessity, an adversarial hearing, notice to the parents and review of the wardship order before expiry. Against the backdrop of urgent circumstances and overall procedural propriety, La Forest J. agreed with the lower courts that the less than full disclosure and notice accorded the parents was minor and of no significance.[166]

Justice La Forest's willingness to provide latitude and flexibility where medical apprehensions are involved seems sensible and pragmatic, especially given the nature of medical emergencies and the wide consensus on the "big" issue, namely, that the state should act rapidly to protect infants endangered by lack of medical care. However, the submerged issue of how the legal standard of "proper medical, surgical or other recognized remedial care or treatment necessary for the child's health or well-being"[167] should be determined deserved fuller inquiry. This is not simply a question of the procedural fairness of the decision-making process or of the formal distribution of power within that process. Rather, the parents' challenge interrogated, at least in part, the persuasive and rhetorical power of the scientific discourse of medical need deployed within the hospital and courtroom by what the Act calls a "legally qualified practitioner". Rather than revive the failed argument made in the earlier stages of the litigation, namely, that the legislation improperly places physicians in the role of judges, the parents resorted to claiming, as set out above, that their own religious liberties are so fundamentally important that the steps taken by the state to "rescue" their infant from grave and immediate danger should be held to extraordinarily strict standards of due process. Given the consensus that the state should intervene, this stance ultimately leaves the parents looking preposterously selfish and untrustworthy. Thus the underlying issues regarding the nature of expertise and the subtle linkages between disciplinary authority and state coercion are easily ignored.

Roughly the same pattern repeated itself in the context of the section 2(*a*) religious freedom argument. Although La Forest J. noted that in his view the parents had experienced a serious rather than trivial violation of their rights to religious freedom,[168] he dealt only briefly and somewhat dismissively with the parents' section 1 submissions.

The parents again argued that, in light of the religious freedoms at stake, the state failed to meet the legislative standard of necessity in apprehending their daughter and, therefore, the apprehension was not a reasonable limit. Justice La Forest at first expressed impatience with this gambit, stating that:

> This argument fails to distinguish between the demonstration of the necessity of the treatment, as contemplated in the Act, and the demonstration of the reasonable nature of the legislative scheme, under s. 1 of

[164] *Child Welfare Act*, R.S.O. 1980, c. 66, s. 19(1)(*b*)(ix); later S.O. 1984, c. 55, s. 37(2); now *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 37(2).

[165] *Supra*, note 146, at 380.

[166] *Id.*, at 379-81.

[167] *Child Welfare Act*, *supra*, note 164.

[168] [1995] 1 S.C.R. 315 at 385.

> the *Charter*. For the reasons already stated, one must take for granted the necessity of the medical treatment and thus, the need for protection under the Act.[169]

Justice La Forest's reference to "reasons already stated" for not questioning the necessity of medical treatment is to his earlier observation that the courts below gave full consideration to the often conflicting medical evidence regarding Sheena B.'s condition.[170] However, the parents were not challenging the assessment of the credibility of the witnesses but rather the way in which the legal standard makes the credibility of medical professionals the pivotal issue. Instead, the parents submitted that where the evidence is conflicting and uncertain, more weight should be given to the parental assessment of what is best for their child. In a sense, they were asking that, in special circumstances, parents be given the same authority on medical issues as medical professionals. Justice La Forest's insistence that the only issue is one of deferring to findings of fact in the courts below, effectively cut short any discussion of the legal standard and its appropriateness in the B.'s situation. Later, in the course of setting out the disposition of the case, La Forest J. perhaps expressed some discomfort with the way he structured the debate in the following passage:

> The concern voiced by the appellants in the present appeal raises the more general question of the appropriateness of proceeding with treatments for which the medical benefits are highly questionable, when parental refusal is in part only grounded on religious beliefs. However, the medical evidence presented in 1983, as well as that presented before Whealy Dist. Ct. J., does not permit us to question the necessity of the blood transfusion, although some might in retrospect be tempted to do so.[171]

While there is no easy answer to the problem of the amount of authority wielded by a wide range of experts within the administrative state, the consistent refusal to acknowledge the issue prevents the development of even the most rudimentary analysis of this complex intersection of private and public power. Instead, medical authority remains intractably private and beyond scrutiny, even when it is deliberately invoked in the extremely public and coercive process of a child apprehension.

---

[169] *Id.*

[170] *Id.*, at 361-62.

[171] *Id.*, at 390.

Among all the decisions handed down this Term, the *R.(B.)* case provides perhaps the clearest example of how the entrenched individualism of the classical liberal vision of political relations serves to reinforce rather than challenge existing institutional and social relations. The judgments contain some of the strongest expressions of the Court's growing tendency to cast Charter issues in terms of the free, self-directed, and socially isolated individual versus the repressive state. At the same time, the B.'s, who sought to use the classical account of the meaning of individual rights to express their concerns as parents and as members of a subordinated religious community, were defeated at almost every juncture. The norms of reasonableness invoked to justify the rejection of the B.'s claim consistently presented dominant values as objective truths and the practices of established institutions as politically neutral technical expertise. Thus the result in the case appeared inevitable and sensible without compromising the central value of individual liberty. However, to the extent that complexities were simplified, diverse conceptions of community rendered invisible, and deeply held values dismissed as foolhardy or irrational, the *R.(B.)* decision represents a defeat for all members of the Canadian polity in terms of the impoverishment of our political discourse.

VII. Freedom of Expression, the Press and Other Media of Communication

The individual subject of constitutional law comes starkly into view in this Term's freedom of expression cases. Here, the abstract individual is made more complete by the Court's conception of the institutions of state and civil society which shape the lives of the individual Charter claimants. Both cases we discuss also concern the Charter's influence on the development of common law limitations on freedom of expression. We defer to Part VIII our discussion of the application issue and the Court's reinscribing of the public/private divide.

One of the key problems facing any theory of freedom of expression is to reconcile its underlying premises with the cultural and political practices of western democracies. Public deliberation amongst self-governing citizens occurs not in the classical liberal sense, between individuals, but interstitially, through powerful mediators.[172] This manifests itself in two ways. First, communication conglomerates exercise this mediating function amongst citizens via

an outpouring of news, information, and entertainment, one often indistinguishable from the other. Second, new information technologies enable what has been called "computer-mediated communication".[173] Through the application of computer technology, individuals are connecting with groups of people through computer bulletin boards and networks overcoming the constraints of both time and place. In both ways, communication is becoming a global phenomenon and the old rules no longer seem to apply or have any relevance.

In Canada, and increasingly around the globe, the startling reality is that media ownership is highly concentrated; in the English-Canadian newspaper industry, for example, ownership is concentrated largely in the hands of only two business concerns.[174] With deregulation, transnational media conglomerates are now seeking to control all aspects of media distribution, from film and television production to videos and music. This drive toward vertical and horizontal integration means that the most powerful media outlets will now be concentrated in the hands of a few.[175]

This close relationship between popular media and private power is exacerbated by the commercial necessity of advertising space.[176] While patrons, readers, and advertisers always have played an important role in the financial life of the press, concerns are now heightened by the growing concentration of power and the close nexus between ownership and editorial control. If contributing to rational political deliberation has been one of the primary objectives of the media — an objective given constitutional recognition in section 2(*b*) — it has been skewed by the marketplace concerns of the media. In Habermas' terms, the media have become the gate

[172] Garnham, "The Media and the Public Sphere" in Calhoun (ed.), *Habermas and the Public Sphere* (1992), at 360 and see Glasbeek, "Comment: Entrenchment of Freedom of Speech of the Press – Fettering of Freedom of Speech of the People" in Anisman and Linden (eds.), *The Media, The Courts, and the Charter* (1986), at 100.

[173] Rheingold, "A Slice of Life in My Virtual Community" in Harasim (ed.), *Global Networks: Computers and International Communication* (1993).

[174] Thomson Newspapers and Southam Inc. together share 47.6 per cent of the English-Canadian newspaper market as of September 1994. See Hackett, Pinet and Ruggles, "News for Whom? Hegemony and Monopoly Versus Democracy in Canadian Media", in Holmes and Taras (eds.), *Seeing Ourselves: Media, Power and Policy in Canada*, 2nd ed. (1996), at 257-72.

[175] McNish, "Merger Mania Starring Michael Eisner and Gerald Levin" *The Globe & Mail* (September 2, 1995), at B1. On the media merger "frenzy," see Barber, *Jihad vs. McWorld* (1995), Chapter 9.

[176] Hollingsworth, *The Press and Political Dissent* (1986).

through which privileged private interests have invaded the public sphere.[177]

Almost in tandem with growing media concentration is the proliferation of new technologies which tend toward a corresponding devolution in power. These new forms of communication enable more people to communicate more information to more places than ever before. Paradoxically, this is a phenomenon not entirely unconnected to the first, namely, the growing concentration of media power.[178] Much of this new technology is being delivered by private industry — the on-line information service "Prodigy," for example, is co-owned by IBM and Sears while the hardware and software is owned by some top Fortune 500 companies. Although culturally specific to affluent societies with access to expensive computers and modems, computer-mediated communication is being made widely available in the western democracies and the far east at relatively low maintenance cost. According to sophisticated users of this technology more information means more "freedom" and a radically decentralized global marketplace of information activity.[179] Where access to computers is available, these technologies render international borders irrelevant and regulation by nation-states difficult, if not impossible.

The Supreme Court of Canada has wrestled on occasion with the tension between the promise of self-government fostered by freedom of expression and the limitations on deliberative practices posed by the concentration of media power. On the one hand, the Court has described the "fundamental importance [of freedom of expression] to a democratic society",[180] and that the media, "by gathering and disseminating news, enable[s] members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being".[181]The media have been described approvingly by the Court as "surrogates for the public"[182] and as "agent of

[177] Habermas, *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society*, trans. T. Burger (1992), at 185.

[178] See Stallabrass, "Empowering Technology: The Exploration of Cyberspace" (1995), 211 New Left Review 3.

[179] See Sterling, *The Hacker Crackdown: Law and Disorder on the Electronic Frontier* (1992) at 61.

[180] *Edmonton Journal* v. *Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1336 per Cory J. for the majority.

[181] *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459 at 475 per Cory J. for the Court.

[182] *Edmonton Journal*, *supra*, note 180, at 1359-60 per Wilson J. (quoting Chief Justice Burger of the United States Supreme Court).

the public in monitoring and reporting on governmental, legal and social institutions".[183] On the other hand, the Court has recognized, as noted in last year's review, that freedom of expression in practice often means freedom only for those who have the financial capacity to express themselves, that is, that "speech often takes place under conditions of scarcity".[184] "Only those with enough wealth to own land, or mass media facilities (whose ownership is largely concentrated)" are able to engage in freedom of expression.[185]

This Term, in *Hill v. Church of Scientology of Toronto*,[186] the Court preferred to maintain the *status quo* in the law of defamation, and this appeared to be the preferred outcome, in part, by reason of the influential power of the media in public discourse.[187] Also this Term, in *Canadian Broadcasting Corp. v. Dagenais,*[188] the Court has signalled that computer-mediated communication provides an important contextual component for freedom of expression jurisprudence, particularly in the case of court-ordered publication bans. That context, however, was entirely ignored in *Hill* despite its pertinence to the developing law of defamation.[189]

One explanation for the Court's contrasting approach to the impact of new information technologies is, perhaps, that classical liberal understandings were implicated in the *Hill* case, and had a lesser role to play in *Dagenais*. Thus, thinking about individuals in the classical liberal sense, as having the proverbial fence of privacy erected around them, helps us to understand the different results in these two cases. In the context of a criminal trial (as in *Dagenais*),

[183] *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421 at 451.

[184] *Haig v. Canada*, [1993] 2 S.C.R. 995 at 1037 per L'Heureux-Dubé J. for the majority. See discussion in Bakan, Ryder, Schneiderman and Young, "Developments in Constitutional Law: The 1993-94 Term" (1995), 6 S.C.L.R. (2d) 67 at 98-102.

[185] *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 at 198 per L'Heureux-Dubé J.

[186] [1995] 2 S.C.R. 1130.

[187] For a more explicit articulation of this rationale, see Lepofsky, "Making Sense of the Libel Chill Debate: Do Libel Laws 'Chill' the Exercise of Freedom of Expression" (1994), 4 N.J.C.L. 169 and Martin, "Does Libel Have a 'Chilling Effect' in Canada?" in Martin and Adam (eds.), *A Sourcebook of Canadian Media Law* (1991), at 757.

[188] [1994] 3 S.C.R. 835.

[189] See *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) and the discussion in Branscomb, "Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace" (1995), 104 Yale L.J. 1639. Even Sopinka J. acknowledged this fact in his address at the University of Waterloo symposium on free speech and privacy: "Freedom of Speech and Privacy in the Information Age" (November 26, 1994) available at gopher://insight.mcmaster.ca:70/00/0rg/efc/doc/sfsp/sopinka.

the accused is presumed to have lost those rights of dignity and privacy which attach to him or her in private civil society. Having been implicated in the criminal process, individual rights are circumscribed and the protection of reputation lost to the exigencies of the open court. Yet, in the usual case of a suit for defamation (the *Hill* situation), the individual is presumed not to have lost the semblance of privacy and regard for reputation which attaches to the individual. Reputation here is likened to property rights, an important component of individual autonomy. In libel law, falsity and malice are presumed, and a damage award analogized to the "taking" (a property law concept) of a person's reputation, requiring compulsory compensation.[190] It is this ideological construct, and the threat posed to it by new information technologies, which may help to better explain the differences in these two cases.

1. Publication Bans

Publication bans of pending or ongoing court proceedings have proven to be an important target in Charter litigation, but assertion of speech interests have not been entirely successful in this regard. In Alberta, for example, the Court of Queen's Bench ordered the cessation of the play "Ilsa, Queen of the Nazi Love Camp", a "musical comedy" which parodied hate promoter James Keegstra, mid-way through its Edmonton run. The play was staged during Keegstra's second trial in Red Deer some 150 kilometres away. The Alberta Court of Appeal affirmed the trial judge's overly cautious approach, concluding that freedom of expression interests would be minimally impaired if staging of the play was delayed until after the trial. This was despite the fact that Keegstra's re-trial was a matter of some public interest and that a small Calgary theatre company and its Edmonton sponsor would incur significant financial losses if the play was banned.[191]

Perhaps the most notorious issuance of a publication ban and its fall-out concerned the trial and sentencing of Karla Homolka. The press were not permitted to report on any of the evidence presented before the Court until such time as that evidence had been introduced at the trial of her co-accused Paul Bernardo.[192] This fuelled

[190] Sunstein, *Democracy and the Problem of Free Speech* (1993), at 47.

[191] See Edmonton Journal (March 6, 1992) at B3; Edmonton Sun (March 8, 1992), at 21.

[192] *R. v. Bernardo*, [1993] O.J. No. 2047 (Ont. Div. Ct.); affd 95 C.C.C. (3d) 437 (Ont. C.A.).

community outrage over her plea bargain of 12 years' imprisonment for her role as accomplice in the deaths of two teenaged girls. One resident of St. Catharines went so far as to distribute leaflets containing banned information about the grisly torture and murders door-to-door in contravention of the court order.[193] The controversy also made clear that court-ordered publication bans, as well as many other forms of government regulation concerning speech, were futile enforcement measures as information about the trial could be obtained via broadcast sources in the United States, print sources overseas, as well as by the spread of new information technologies, such as Internet.[194] It was this context which helped to prompt the Supreme Court in *Dagenais* to issue guidelines concerning the use of publication bans in criminal trial proceedings.

The dispute in *Dagenais* arose during the trial of four members of the Catholic religious order, the Christian Brothers. All five men were standing trial, or had commenced their trials, on charges of having physically and sexually abused young boys under their charge at a residential school in Ontario. Similar charges had been laid against Christian Brothers at Mount Cashel in Newfoundland. The disclosure of the sexual abuse at Mount Cashel was a highly publicized event, leading to the uncovering of similar events in locations all over the country. With the laying of charges, victims of sexual abuse at residential schools were emboldened to come forward in Ontario and elsewhere. The events at Mount Cashel provided the foundation for the fictionalized account, "The Boys of St. Vincent", a National Film Board of Canada production. The mini-series was scheduled to be broadcast nation-wide over the Canadian Broadcasting Corporation and a local Montreal station which broadcast into Eastern Ontario.

The accused successfully sought an order before the Ontario Court of Justice restraining the broadcast of the film and any advertisement relating to its broadcast until such time as the four trials were completed. The presiding judge also went so far as to seal the Court record concerning the application until the completion of the trials. The Ontario Court of Appeal upheld the order, but unsealed the record and modified the ban so that it applied only to the Province of Ontario and the Montreal station. Chief Justice Dubin for the

[193] "Defied Homolka Ban, Man Fined $4,000" *The Globe & Mail* (July 1994), at A6.

[194] "Bureaucrats can access Teale details" *The Calgary Herald* (January 6, 1994) at A7.

Ontario Court of Appeal characterized the dispute as a conflict between two express Charter values: freedom of expression and the right to a fair trial. In the event of such a conflict, the former freedom was to give way to the latter right. The guarantee of expression could still be exercised to its fullest at a later date, while the right to a fair trial would be impaired irreparably if expression rights were to have priority.

A majority of the Supreme Court rejected a "hierarchy-of-rights" approach, allowed the appeal and reversed the decision ordering the publication ban.[195] In so doing, the Court designated the process for the appeal of publication bans ordered by superior court judges directly to the Supreme Court, issued guidelines for courts making publication ban orders, and, lastly, modified the third branch of the proportionality test in *Oakes*. Of concern here are the latter two rulings, although the extraordinary process available to third parties to appeal interlocutory orders in the context of criminal trials directly to the Supreme Court of Canada should not escape notice. All of the judges of the Court noted the present inadequate state of the law as concerns third party challenges to publication ban orders and called upon Parliament to provide a clear remedial path for appeal.[196]

According to the majority judgment of Chief Justice Lamer, the common law rules regarding publication bans preferred the right to a fair trial over freedom of expression. In the era of the Charter, even as applied to the common law, "a hierarchical approach to rights ... must be avoided" and a balance "achieved that fully respects the importance of both sets of rights".[197] The majority opinion also eschewed the conflict model of free press versus fair trial which they associated with the American model of free speech. Fair trial interests are sometimes impeded and, on other occasions, promoted by open access to court proceedings, and the Court catalogued some of these potential effects in its judgment.[198]

The majority opinion also reflected upon the efficacy of publication bans as a prophylactic to media influence on the trial process.

[195] Lamer C.J. wrote the principal judgment (Sopinka, Cory, Iacobucci and Major JJ. concurring) for the majority. McLachlin J. wrote a separate concurring opinion. La Forest and L'Heureux-Dubé JJ. wrote separate dissents, both finding the Court had no jurisdiction to hear the appeal. Gonthier J. also dissented, upholding the publication ban as it applied to the two accused who had yet to be tried.

[196] *Dagenais*, *supra*, note 188, per Lamer C.J. at 858; per L'Heureux-Dubé J. at 917; per McLachlin J. at 947-48; per La Forest J. at 894.

[197] *Id.*, at 877.

[198] *Id.*, at 882-83 per Lamer C.J.; see also La Forest J. at 894.

Juries may not be so easily influenced by news reports and, even if they are, they are likely capable of following the judge's instructions to ignore all information presented to them outside of the court proceedings.[199] Moreover, the Court admitted, new information technologies have made court-ordered publication bans even less efficacious: "In this global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult. Therefore, the actual effect of bans on jury impartiality is substantially diminishing."[200] This observation throws into question the efficacy of all content-based state regulation of expression, regulations which the Court approved in its decisions in *Keegstra*, *Butler*, and the *Prostitution Reference*.[201]

Taking into account these factors, the Court articulated a test, fashioned after that in *Oakes*,[202] for the issuance of publication bans under the common law or legislated discretionary authority. According to the Court, a publication ban should be ordered when:

> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.[203]

Applied to the case, the initial order of Gotlib J. would not have passed even the first stage of the test. Not only was the ban over broad, applying as it did to the whole of the country and prohibiting even reports of the ban itself, other less restrictive alternative measures were available. These included adjourning trials, changing venues, sequestering jurors, using jury selection procedures, and "strong judicial direction" to the jury.[204]

The test also suggests a modification of the third step of the second branch of the *Oakes'* proportionality test. According to *Oakes*, the state need only show in the third and last step that the importance of the objective outweighs the deleterious effects of the challenged measure. This usually is easily proved, having determined,

[199] *Id.*, at 884-85.

[200] *Id.*, at 886 and see Sopinka J. *supra*, note 189.

[201] See *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R v. Butler*, [1992] 1 S.C.R. 452; *Reference re Criminal Code, ss. 193 and 195.1(1)(c)*, [1990] 1 S.C.R. 1123.

[202] *R. v. Oakes*, [1986] 1 S.C.R. 103.

[203] *Dagenais, supra*, note 188, at 878. (Emphasis added.)

[204] *Id.*, at 881.

in the first step in *Oakes*, that the objective is sufficiently pressing and substantial to warrant overriding the Charter rights and freedoms. As the second branch of the new common law rule suggests, Lamer C.J. concluded that the test be modified to require that both "the underlying *objective* of a measure and the *salutary effects* that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms".[205] Therefore, the objective's importance will not, in and of itself, save restrictions on Charter rights and freedoms unless the beneficial effects of the measure also outweigh its negative effects. The impetus for this change in the last step in *Oakes* is unclear, particularly in the context of this case, where failure to meet the least restrictive alternative requirement was easily proved by the press. Indeed, the last step has proven, in most every case where it is applied, to have been largely redundant, most of the work being done by the second branch of proportionality test — the least restrictive means test. It seems curious that the Court should see any need to strengthen this last requirement, other than being motivated by a concern that the integrity of the whole test is at stake — if any one requirement appears to be superfluous, then other parts of the test become questionable. If this was a motivating concern, an alternative for the Court would have been to question the utility of this part of the test altogether. Yet the likely, and unmentioned, consequence is that a revised and strengthened last step will make it more difficult for governments to satisfy the *Oakes* burden of proof — a consequence at odds with much of the post-*Oakes* section 1 jurisprudence concerned with showing more deference to legislative choices.

Justices Gonthier and L'Heureux-Dubé, in separate judgments, expressed strong disagreement with the majority's modification of the common law criteria for issuing publication bans. Both concluded that the common law *status quo* adequately protects free expression interests. Justice Gonthier went so far as to endorse the decision of the Alberta Court of Appeal in *Keegstra*, mentioned above, as the model of judicial prudence. In the event of two fundamental Charter rights coming into conflict, Gonthier J. recommended that the minimal impairment branch of the *Oakes* test not be applied too rigorously in order that "minimal impairment of one of the rights ... [not] theoretically mean maximal impairment of the

[205] *Id.*, at 887. (Emphasis in original.)

other".[206] The United States experience was instructive for Gonthier J., as preferring freedom of expression over fair trial rights has led to the virtual rejection of prior restraint orders.[207] But it is important to note, which Gonthier J. did not, that the first amendment has not done away entirely with publication ban orders,[208] nor does the majority endorse entirely doing away with the exercise of judicial discretion.

2. Libel and Slander

The media, publishers, authors, and civil liberties groups long have been critical of the strict liability approach of the common law of defamation. It is argued that the common law approach places rigid limitations on deliberation regarding matters of public concern. This disquiet is not without foundation. Public figures prominent in Canadian public life have been prolific plaintiffs in the jurisprudence of defamation law.[209] Then British Columbia Premier Bill Bennett successfully sued a member of the opposition for suggesting he tippled drink on the job[210] while former Minister of Defence, Bob Coates, succeeded in his libel suit against the Ottawa Citizen for suggesting that he disclosed state military secrets to patrons in a West German bar.[211] Trial judges, in particular, have exhibited a distinct lack of humour about political affairs. Bill Van Der Zalm, then Minister of Human Resources in British Columbia, successfully sued an editorial cartoonist for depicting him tearing the wings off of flies[212] while political commentator Allan Fotheringham was the subject of a suit for likening federal Liberal party insiders in B.C. to members of the Shaughnessy "wife-swapping" set.[213] If the Court appeared to be deferential to expression interests in *Dagenais*, particularly where two

[206] *Id.*, at 923.

[207] *Id.*, at 924. See *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

[208] See, *e.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

[209] See generally the discussion in Klar, "If You Don't Have Anything Good To Say About Someone ..." in Schneiderman (ed.), *Freedom of Expression and the Charter* (1991), at 261.

[210] *Bennett v. Stupich* (1981), 125 D.L.R. (3d) 743 (B.C.S.C.).

[211] *Coates v. Citizen (The)* (1988), 44 C.C.L.T. 286 (N.S.S.C.).

[212] *Van Der Zalm v. Times Publishers* (1979), 96 D.L.R. (3d) 172; revd (1980), 109 D.L.R. (3d) 531 (B.C.C.A.).

[213] *Hunter v. Fotheringham*, [1986] B.C.J. No. 2279 (B.C.S.C.). For a recent example of this distinct lack of judicial tolerance for open public debate at the appeal level, see *Mitchell v. Nanaimo District Teachers Assn.* (1994), 94 B.C.L.R. (2d) 81 (C.A.).

Charter rights had to be balanced one against the other, one would have anticipated a significant victory for the press in a challenge to the common law of libel where no explicit Charter right was to be weighed in the balance against expression.

Although not a suit against the media itself, *Hill v. Church of Scientology* concerned an appeal from the largest jury award for defamatory libel in Canadian history. Casey Hill, a Crown Prosecutor in Toronto, was awarded $1.10 million dollars for defamatory statements made by the Church of Scientology and their counsel Morris Manning at a press conference held to publicize contempt proceedings being launched against Hill. Relations between the Church of Scientology and Hill went as far back as 1977, when the Crown Law Office began investigating the Church's activities and it, in turn, began closely monitoring Hill's activities. Hill was labelled "Enemy Canada", and in the Church's file of that name it was revealed that the Church had been tracking Hill for four years with a view to "neutralizing" him.[214]

The particular incidents which gave rise to the libel occurred in 1983, when Hill advised the Ontario Provincial Police regarding the search of the Church of Scientology's premises and the seizure of some 250,000 documents, amounting to over 2 million pages of material. In a motion to quash the search warrant, in which Hill represented the Crown, Justice Osler ruled that solicitor-and-client privilege applied to 232 of the seized documents, and ordered that they be sealed.

In the interim, and in an unrelated matter, the Church had made application to the Ministry of Consumer and Commercial Relations that its president, Reverend Earl Smith, be authorized to solemnize marriages. The Deputy Registrar General believed that she could be assisted in making her decision by reviewing the seized documents. A lawyer in the Civil Division of the Attorney-General's office contacted her counterpart Hill in the Criminal Division. Hill advised that access to the documents could be obtained only with a court order. That order was obtained by the Civil Division without notice to the Church.

Upon being informed by the Deputy Registrar General that she had reviewed certain of the documents that had been seized, lawyers for the Church moved quickly. On the assumption that documents which had been protected by solicitor-client privilege, either sealed or mistakenly left unsealed, had been disclosed, disciplinary hear-

[214] [1995] 2 S.C.R. 1130 at para. 21.

ings before the Law Society of Upper Canada and applications for contempt were threatened. Finally, Morris Manning, appearing in his barrister's gown on the steps of Osgoode Hall, read from the contempt motion which was to be filed the next day. In it, the Church charged Hill and Jerome Cooper, a lawyer in the Ministry of Consumer and Commercial Relations, with having permitted access to court-ordered sealed documents. The libel was broadcast and reported widely in southern Ontario.

The jury award of $300,000 in general damages (jointly against Manning and the Church), and $500,000 in aggravated damages and $800,000 in punitive damages (against the Church alone) was amply justified, wrote the Ontario Court of Appeal, on the basis of the evidence before the jury and by the conduct of the Church following the jury's verdict. The Church held its press conference even when its own preliminary investigation suggested that the contempt allegations were unfounded. After the verdict, the Church was unrepentant, repeating the libel in pleadings and argument before the Court of Appeal.[215] The Church, in the words of the Ontario Court of Appeal, "was engaged in an unceasing and apparently unstoppable campaign to destroy Casey Hill and his reputation".[216] The sums awarded by the jury were justifiable, the Court concluded, despite the fact that Hill received four promotions, was elected both a bencher of the law society and President of the Ontario Crown Attorney's Association.[217] He has since been appointed a Judge of the Ontario Court of Justice.

The main constitutional issue before the Supreme Court of Canada was whether the common law of defamation was consistent with the Charter's guarantee of freedom of expression. Subsidiary issues concerned the defence of qualified privilege and the amount of the damage award. All of the issues were joined by the argumentative thread that the Canadian law of libel deterred legitimate deliberation on issues of public concern, that is, that libel law had a "chilling effect" on public discourse.[218] On this point, the Court was

[215] *Hill v. Church of Scientology* (1992), 18 O.R. (3d) 385 (C.A.) at 458-59.

[216] *Id.*, at 459.

[217] *Id.*, at 439.

[218] Empirical studies on the impact of libel law on the press are equivocal. Compare Blasi, "The Newsman's Privilege: An Empirical Study" (1971), 70 Mich. L.R. 229; Labrunski and Pavlik, "The Legal Environment of Investigative Reporters: A Pilot Study" (1985), 6 Newspaper Res. J. 13; Barrett, "Declaratory Judgments for Libel: A Better Alternative" (1986), 74 Cal. L.R. 847 with Bow and Silver, "Effect of *Herbert v. Lando* on Small Newspapers and TV Stations" (1984), 61 Journalism Q. 414; Weaver and Bennett, "Is New York Times 'Actual Malice' Standard Really Necessary? A Comparative Perspective" (1993), 53 Louisiana L.R. 1153.

unmoved.[219]

The Court signalled its ruling on the balance between freedom of expression and reputation by designating defamatory statements as being "tenuously related to the core values which underlie s. 2(b)".[220] Applying a more "flexible" approach to balancing than is required under section 1 of the Charter,[221] the Court weighed against this "low value" speech the value of a person's reputation, which has particular significance for those practising law, for "a lawyer cannot survive without a good reputation".[222]

Much of the decision addresses the question whether Canadian courts should adopt the rule relaxing the strict liability approach of libel law articulated by the United States Supreme Court in *New York Times v. Sullivan*.[223] Freedom of speech in the United States reached its high-water mark in that case, which concerned the alleged defamation of a police commissioner in Montgomery, Alabama. As part of a concerted campaign against the civil rights movement and the northern establishment press, *Sullivan* simply was one in a series of libel suits amounting to a claim of almost $300 million in damages.[224] Perhaps going farther than was necessary on the facts of the case,[225] the U.S. Supreme Court held that the common law presumptions of falsity and malice, which rendered libel a strict liability tort, did not sufficiently protect speech interests.Where the plaintiff is a "public" official, the solution was to place the onus on the plaintiff to show that the defendants made the statements with "actual malice", with knowledge or reckless disregard of their falsity.

[219] The Court has accepted the chilling effect argument in a limited number of cases. The press arguments concerning chilling effect were accepted in *R. v. Zundel*, [1992] 2 S.C.R. 731 (false news provision of the *Criminal Code* over broad deterring legitimate expression), while Justice La Forest accepted the media's claim of chill in *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421 (search and seizure of media offices). The press argument was rejected in *Canadian Newspaper Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122 (publication ban on identities of complainants in sexual assault cases upheld as media are competent enough to determine what material subject to the ban) and *Lessard, id.*

[220] *Hill, supra*, note 214, at para. 106.

[221] *Id.*, at para. 97.

[222] *Id.*, at para. 118.

[223] 376 U.S. 254 (1964).

[224] See Kagan, "A Libel Story: *Sullivan* Then and Now" (1991), Law & Soc. Inq. 17 at 19-20 and Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991), at 36.

[225] See Epstein, "Was *New York Times v. Sullivan* Wrong?" (1986), 72 Univ. Chi. Law Rev. 782 at 786-92.

In the 20 years since the ruling, there have been all variety of criticisms aimed at the actual malice rule. These include such concerns as the shift away from inquiring into the truth of the allegation to an inquiry into the defendant's negligence, the social cost in the constitutional protection of falsehood which could have the negative effect of actually distorting public debate,[226] and the difficulty of defining who is "public figure" for the purposes of the rule.[227] Justice Cory recited a variety of these criticisms as grounds to reject the adoption of the actual malice rule in Canada.[228] Justice Cory also invoked recent Australian and English decisions, and Australian and Irish Law Reform recommendations all of which have shied away from embracing the *New York Times v. Sullivan* rule. He saw little problem to democratic politics posed by the common law rules. Echoing the common law view, Justice Cory wrote: "Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish."[229]

A revealing aspect of the decision is the selective nature of the evidence the Court invoked. In response to criticisms of the actual malice rule, a number of reforms to the American law of libel have been proposed, such as confining the rule to only political speech concerning governmental matters,[230] or non-monetary judgements which focus solely on the truth or falsity of the alleged libel[231] — none of these are discussed by the Court. The Court's treatment of the recent Australian decision of *Theophanous*[232] and the companion case *Stewart*[233] is also suggestive. Cory J. described *Theophanous* as displaying a marked reluctance on the part of the Australian High Court to tamper with the existing common law rule.[234] On the contrary, the

[226] See Bollinger, *The Tolerant Society* (1986).

[227] See generally, Smolla, *Suing the Press: Libel, the Media, and Power* (1986). It has even been suggested that *Sullivan* has led to a decline in investigative reporting: see Marshall and Gilles, "The Supreme Court, the First Amendment, and Bad Journalism", [1994] Sup. Ct. Rev. 169.

[228] Cory J. also cited Justice White's subsequent rejection of the rule (White J. was a member of the majority opinion in *New York Times*) in *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

[229] *Hill, supra*, note 214, at para. 137.

[230] Sunstein, *Democracy and the Problem of Free Speach*, (1993), at 159-162.

[231] See the discussion in Smolla, "Taking Libel Reform Seriously" (1987), 38 Mercer L. Rev. 793.

[232] *Theophanous v. Herald & Weekly Times* (1994), 124 A.L.R. 1 (H.C.).

[233] *Stephens v. West Australian Newspapers Ltd.* (1994), 124 A.L.R. 80 (H.C.).

[234] "Although a plurality of the seven judges sitting on the High Court held that the existing law of defamation curtailed the constitutionally protected right to political discussion, it rejected the adoption of the 'actual malice' standard": [1995] 2 S.C.R. 1130, at para. 135.

Court concluded that the common law did not strike a fair balance between free political discussion and the protection of reputation (this, in a country without a written Bill of Rights).[235] The case concerned a member of the House of Representatives suing the press for publishing a defamatory letter to the editor critical of the plaintiff's record as Chairperson of the Standing Committee on Immigration. The Court accepted that the common law of defamation could "inhibit the exercise of freedom of communication" (the chilling-effect argument)[236] but did shy away from adopting the actual malice standard. Instead, a mid-way point was found by allowing a defendant to escape liability if "circumstances were such as to make it reasonable to publish the impugned material without ascertaining whether it was true or false". A publisher would be required to show that:

> ... in the circumstances which prevailed, it acted reasonably, either by taking some steps to check the accuracy of the impugned material or by establishing that it was otherwise justified in publishing without taking such steps or steps which were adequate.[237]

As long as the defamatory statement was made concerning political matters, was not made recklessly or with knowledge of its falsity, and was reasonable in the circumstances, a defendant will escape liability. This was virtually the same position put to the Court in *Hill* by the intervenor the Canadian Civil Liberties Association.

As concerns the defence of qualified privilege, Cory J. did admit that the common law rule was too restrictive. Qualified privilege rebuts the presumption that a defamatory statement was made with malice due to the surrounding circumstances. The rule is available when the person making the statement has a duty or interest, whether it be legal, social or moral, to make it and the person to whom it is made has a corresponding duty or interest to receive it. Therefore, when a lawyer files documents with a court registrar that contains defamatory statements, the lawyer is presumed not to have intended to publish the statement with actual or express malice. Morris Manning argued that the defence should be available prior to the filing of court proceedings, such as in the recitation of the contents of a notice of motion on the court house steps. The Court,

[235] See Walker, "The Impact of the High Court's Free Speech Cases on Defamation Law" (1995), 17 Sydney L. Rev. 43.

[236] *Theophanous, supra*, note 232, at 19.

[237] *Id.*, at 23.

L'Heureux-Dubé J. dissenting on this point, accepted that section 2(*b*) required the rule to be modified, but not so far as to relieve Manning of his liability in the circumstances of the case as his "conduct far exceeded the legitimate purposes of the occasion".[238]

The Court did not budge on the issue of damages. The jury's assessment of damages would not be tampered with "unless it shocks the conscience of the court".[239] Nor would the Court agree that a cap on damages in defamation suits is necessary, as it has found in cases of serious personal injury.[240] Given the usual paucity of damage awards in Canada for defamation, there is "no pressing social concern" similar to that which required a cap on personal injury awards.[241]

Indeed, the quantity of damage awards for defamation in Canada has been cited by commentators as one reason not to modify the existing common law rules.[242] While the facts in the *Scientology* case, admittedly, are extraordinary and the unremitting campaign to destroy Hill's reputation exceptional, it might be that the jury award in the case will have the effect of driving up damage awards in other cases. Even discounting the punitive and aggravated damages awarded in the case, the sum of $300,000 in general damages surely will have some precedential value. This has been borne out in the next libel case the Court heard — in *Botiuk*, the Court affirmed an award of $200,000 in compensatory and general damages.[243]

It should be kept in mind that just as all variety of expressive activities are caught by section 2(*b*), an even greater variety are subject to threats of defamation suits. The strict liability approach to defamation together with the quantum of damages, both of which the Court condones, means that both small and big presses must be cautious regarding even important subjects of public concern if they could have the effect of being defamatory. As Robert Martin has stated, the Courts have exhibited "a distinct lack of sympathy for

[238] *Hill, supra,* note 234, at para. 155.

[239] *Id.*, at para.163.

[240] See the personal injuries damages trilogy: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Arnold v. Teno*, [1978] 2 S.C.R. 287; *Thornton v. Board of School Trustees of School Dist. 267*, [1978] 2 S.C.R. 267.

[241] *Hill, supra*, note 234, at para. 169. In any event, the Court concluded, if a cap similar to that on personal injury awards was in place, the general damages of $300,000 awarded by the jury would come close to a capped award in 1991 of $250,000: *id.*, at para.173.

[242] *Id.*, at para. 140, per Cory J.; Martin, *supra*, note 187, at 758.

[243] *Botiuk v. Toronto Free Press*, [1995] 3 S.C.R. 3.

investigative reporting"[244] and it is this form of reporting which remains the mark of the alternative press.

While the effect of libel chill on large media outlets may be in some dispute, reform of libel law would have done nothing to make the media more accessible to those without the funds to speak to the community at large. But it also is true that maintenance of the *status quo* does not either. Arguably, it makes matters worse. If media barons such as Conrad Black can more effectively use the club of defamation so as to silence critique[245] — critique which may even be false, but reasonably made in the circumstances — then those who make it their concern to speak out regarding matters of public interest are in a much worse position.

Lastly, the cultural arguments which have been made to support the *status quo* in defamation law — that Canada is a jurisdiction less amenable to free speech absolutism — have less import given the rapidly concentrating and privatizing spheres of communication.[246] Not only are there fewer effective vehicles for the mass dissemination of alternative political viewpoints — consider, for example, the privatization of public media outlets in Alberta and in Ontario — those vehicles are being concentrated in fewer hands. As these spaces shrink, the new communication conglomerates exercise even wider influence. With stations such as the Cable News Network operating in over 130 countries and conglomerate owners such as Rupert Murdoch having access to a potential audience of two-thirds of the world's population,[247] control over the tools of democratic deliberation remain available to only the privileged few. At the same time, the proliferation of new vehicles for publication via Internet, make cultural arguments even less cogent. With the globalization of American culture and intellectual property, perhaps it is only a matter of time until legislatures in every jurisdiction in Canada are forced to reform the Canadian law of libel so that it conforms more closely to the American model.

[244] Martin, "Does Libel Have a 'Chilling Effect' in Canada?" in Martin and Adam (eds.), *A Sourcebook of Canadian Media Law* (1991), at 761.

[245] See "Conrad Black Writ Large", *The Globe & Mail* (November 29, 1990) D1.

[246] See, for example, Bryant, "Section 2(b) and Libel Law: Defamatory Statements About Public Officials" (1991-92), 2 M.C.L.R. 335.

[247] See Barber, *Jihad vs. McWorld* (1995), Chapter 9, at 105, 103.

VIII. THE STATE AND CIVIL SOCIETY: THE APPLICATION OF THE CHARTER AND THE PUBLIC/PRIVATE SPLIT

The *Hill* and *Dagenais* cases also raised key questions about the scope of the Charter's application to judicial law-making and to social relations between individuals within liberalism's private sphere. Section 32 of the Charter encodes the liberal principle that state interactions with the individuals and institutions of civil society should be held to a strict standard of respect for the values of individual autonomy, equality before the law and fairness. The counterpoint to that principle is the notion that the public values which structure individual relations with the state are inappropriate in the context of relations among persons within the private realm of civil society. Indeed, classical liberalism views the imposition of public values on private relationships as an interference with individual autonomy and freedom. Thus the private is not simply different from the public but rather the two sides of the divide mutually define each other in opposition. Although often discussed and referred to in starkly abstract terms, the theoretical divide between state and society is premised on a set of assumptions about the institutions which inhabit the two spheres. In short, the state is presumptively coercive and acts through regulation. Its institutional core is its regulatory apparatus and its fundamental character is punitive and repressive. In direct contrast, the realm of society is presumptively pre-political, outside of law, and therefore free in the negative sense of unconstrained by state-imposed norms and restrictions. Its institutional core is the family, the heart of personal, intimate relations of love and affiliation, and the market, the arena of self-fulfilment through the pursuit of self-interest. Constitutional rights are carefully calibrated to ensure the boundary between public and private is compromised only to the extent necessary to maintain minimum conditions of social order and co-ordination.

The classical liberal understanding of entrenched constitutional rights as rights against the state sketched out above tends to reinforce notions of autonomy in terms of a negative right to privacy or right to be "left alone", and equality in terms of formal equality or a right to same treatment by the state notwithstanding differences in power and privilege. As the previous sections of this essay have emphasized, the cases this Term on the nature of equality and liberty rights and of the fundamental freedoms in the Charter, represent a remarkable and disturbing shift into the political vocabulary associated with classical liberalism. Thus it is no surprise that the Court's return to the foundational questions raised by section 32 of the Charter confirms this trend.

In *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery*,[248] the case in which the Court first outlined its doctrinal approach to the scope of the Charter's application under section 32, the Court explicitly embraced the separation between state and society and the notion that rights such as those in the Charter are directed at protecting private persons from oppression in their relations with the Canadian state. However, rather than framing the test of Charter application in terms of the normative and political reasons for requiring the protection of rights in some situations and not in others, for instance, in terms of the values which characterize state, market and family institutions, the Court formulated an approach which focused on the presence or absence of government action. By inference, it thereby endorsed the notion that public and private spheres are constituted in opposition to each other, that is, that the one is what the other is not. Furthermore, the Court defined government in terms of the legislative, executive and administrative branches but not the judicial branch. Thus, on *Dolphin*'s account, the public sphere mapped on to a comparatively narrow institutional notion of the state while the private sphere converged with the judicial branch, court orders and most of the common law. The common law was subject to review only to the extent that it formed the basis for something which fit the "branch of government" notion of the state.

Although the descriptive nature of *Dolphin*'s account of the separation between state and society neatly sidestepped any need for an indepth inquiry into the political coherence of the dichotomy, the assertion that law made by judges is not a part of the state apparatus seemed destined to plunge courts into a swamp of endless and absurd contradictions. In particular, the exclusion of the judicial branch relied on the anachronistic view that judges are not making law when settling disputes between persons in accordance with the common law and thus the common law does not count as regulation. As if in anticipation of the eventual problems with this untenable position, McIntyre J., writing for the full *Dolphin* Court on this point, concluded his analysis of the government action doctrine by stating that nevertheless "judges ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution."[249]

---

[248] [1986] 2 S.C.R. 573.

[249] *Id.*, at 603.

The decisions this Term form part of a line of cases which have explored the extent to which this exhortation, in spite of the government action doctrine, effectively extends the reach of the Charter to courts, court orders, and the common law divorced from any connection with a branch of government other than the judicial branch. In the previous cases,[250] the Court's discussion of the application issue has been extremely brief, often leaving one with several possible explanations for the Charter's relevance in each particular instance. This past term, the Court returned to the question of the Charter's relationship to the common law on two occasions. The first case, *Canadian Broadcasting Corp. v. Dagenais*,[251] in many respects deepens rather than removes the uncertainty created by the previous cases. The *Dagenais* Court unanimously agreed that the Charter was relevant to the common law based publication ban which was the focus of the litigation. Nevertheless, it was divided on the question of how the Charter's undisputed relevance to the issue does or does not fit within *Dolphin*'s government action test. In *Hill v. Church of Scientology of Toronto*,[252] however, the Court finally provided a lengthy and unified consideration of the relation between the Charter and the common law and of the meaning of McIntyre J.'s exhortation in *Dolphin*.

1. *Dagenais*: the Demise of the Government Action Doctrine

As explained in Part VII.1 of this essay, the *Dagenais* case was something of a procedural anomaly. Although it was styled as an action between private parties, namely, between Dagenais and several other individuals on the one hand, and the C.B.C., on the other, and although the order for the publication ban sought by Dagenais was based on the common law discretion of the trial judge, the issuance of the ban was directly related to the conduct of criminal proceedings against the applicants. Thus the case fits comfortably, along with a number of previous cases, into a potentially narrow "criminal sphere" exception to the *Dolphin* directive that the Charter does not apply to judicial development of the common law.[253] This is truly an

[250] See, *e.g.*, *Rahey v. R.*, [1987] 1 S.C.R. 588; *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *R. v. Salituro*, [1991] 3 S.C.R. 654, and *R. v. Swain*, [1991] 1 S.C.R. 933.

[251] [1994] 3 S.C.R. 835.

[252] [1995] 2 S.C.R. 1130.

[253] See cases cited *supra*, note 250.

exception that proves the rule for the criminal law is the paradigm example of government action which can completely negate the freedom and autonomy of individuals. In other words, to hold that the Charter applies to the publication ban in *Dagenais* is to take a stance which arguably reinforces rather than undermines *Dolphin*'s adherence to the liberal principle that social life divides naturally into public and private spheres whose fundamental character flows from their mutual opposition.

However, in *Dagenais*, only McLachlin and La Forest JJ., in separate reasons, saw the case in this light. Justice McLachlin was the clearest in this regard. She reaffirmed the underlying principle in *Dolphin* that constitutional rights only "apply 'vertically' to relations between the individual and the state".[254] In spite of the broad exclusion of court orders and the common law from *Dolphin*'s notion of state action, she found that subsequent cases support the proposition that "court orders in the criminal sphere which affect the accused's *Charter* rights or procedures by which those rights may be vindicated must themselves conform to the *Charter*".[255] Justice LaForest stated that he found McLachlin J.'s comments "particularly helpful" and added the observation that "the Queen's judges" when conducting criminal trials are "exercising powers flowing from the sovereign as the fountain of justice".[256] Justice Gonthier wrote only two sentences on application and remained agnostic on the main issue of how the Charter's relevance fits with *Dolphin*'s interpretation of section 32.[257]

Chief Justice Lamer, for the majority, pursued a different line of analysis from McLachlin J. Rather than treating the Charter's application to the court-ordered publication ban as a logical exception to *Dolphin*'s exclusion of judicial law-making from Charter scrutiny, he took the position that there is no need to address the section 32 direct application issue because the Charter applies indirectly by virtue of *Dolphin*'s statement that judges *ought* to take account of Charter values regardless of section 32 and the government action doctrine. In Lamer C.J.'s view, *Dolphin*'s exhortation means that it was "*necessary* to reformulate the common-law rule governing the issuance of publication bans in a manner that reflects the principles of the *Charter*".[258] Chief Justice Lamer added that not to do so consti-

[254] *Supra*, note 251, at 942.

[255] *Id.*, at 944.

[256] *Id.*, at 893.

[257] *Id.*, at 918.

[258] *Id.*, at 878. (Emphasis added.)

tutes an error of law on the face of the record sufficient to ground an appeal or a *certiorari* application. Furthermore, although no one's rights had been violated in the manner contemplated by section 24 of the Charter, Lamer C.J. found that the remedies which would be available under section 24 should be also available in any Charter review of the common law.[259] Finally, Lamer C.J. asserted that a judicial reformulation of the common law of publication bans in a manner consistent with Charter values should incorporate the shift in onus as well as reflect, in substance, the considerations in the *Oakes* test developed under section 1 of the Charter.[260] Indeed, as discussed in the previous section of this essay, Lamer C.J. added a new requirement to the third step in the *Oakes* proportionality analysis. In short, it would appear that whether or not a government actor is somehow linked to the issue before the courts, any decision by the courts is subject not only to Charter review and Charter remedies but also to the analytic framework governing Charter litigation. While Lamer C.J.'s analysis does not permit the development of freestanding constitutional torts, namely, actions brought by one private party against another alleging damages for interference with Charter rights, it prevents the enforcement of common law based claims by one party against another where to do so would violate Charter values. McLachlin J. put it quite bluntly:

> ... the practical effect of the Chief Justice's approach ... may mean that *all* court orders would be subject to Charter scrutiny. Even purely private litigation would be subject to review on *Charter* grounds.[261]

Justice L'Heureux-Dubé accepted Lamer C.J.'s basic contention that the Charter applies to the issue in *Dagenais* indirectly by virtue of McIntyre J.'s statement that Charter values ought to inform judicial development of the common law.[262] Thus, Lamer C.J.'s reasons have a majority of six on that point. However, she proposed that although the Charter does not apply to "court orders *per se*",[263] judges

[259] *Id.*, at 866. Lamer C.J. was particularly concerned at this juncture with the limited remedial powers of *certiorari*. However, he stated the rationale for ensuring that the full panoply of s. 24 remedies are available through a *certiorari* challenge in terms that would apply generally to any review of the consistency of the common law with Charter values: *id.*

[260] *Id.*, at 878.

[261] *Id.*, at 941. (Emphasis in original.)

[262] *Id.*, at 908-12.

[263] *Id.*, at 908.

can be government actors in some situations and thus find themselves and their activity directly subject to the Charter. In L'Heureux-Dubé J.'s view, this occurs when judges are exercising "their inherent right to control their process".[264] The difficulty with L'Heureux-Dubé J.'s distinction is raised by the *Dagenais* case itself. The publication ban sought by *Dagenais* can plausibly be related both to judicial management of the criminal trial process and the settlement of a dispute between the applicants and the C.B.C.

In *Dagenais*, both McLachlin and L'Heureux-Dubé JJ. strove to maintain the coherence of *Dolphin*'s government action doctrine. In contrast, Lamer C.J.'s approach treated section 32 as superfluous. This seems particularly startling because the Chief Justice, with the support of the majority, then went on to significantly alter the common law rule in light of the Charter values of freedom of expression. Thus we seem to have moved abruptly from a world in which a very narrow range of social relations are subject to Charter scrutiny to a world in which everything is public in the sense that the norms of behaviour required by Charter protections will be imposed either directly or indirectly on the full range of issues which come before the court. Indeed, along with the government action doctrine, the majority reasons implicitly cast into doubt the workability of a negative conception of human freedom and the concomitant and orthodox notion that rights enforce the separation between public and private. However, this latter theoretical concern is dispelled by the *Hill* case.

2. *Hill*: The Reinscription of the Public/Private Split

Hill, unlike *Dagenais*, presented no way of easily preserving the *Dolphin* vision of the scope of Charter application and placed the practical problem raised by MacLachlin J. squarely before the Court. The decision is also important because it presents a comparatively unified and extensive discussion of the Charter's relationship to the common law while revisiting and, to a certain extent, revising the decision in *Dagenais*. As noted in "Libel and Slander" above, L'Heureux-Dubé J. differed from her colleagues on one point unrelated to the section 32 issue. Otherwise the full Court agreed with the reasons of Cory J.

Hill, like *Dolphin*, was an action between two private parties based on the common law of tort. The only connections to a "branch of government" were that the plaintiff, Casey Hill, was a Crown

[264] *Id.*, at 910.

prosecutor, the libel he was complaining of occurred in relation to his work for the Crown, and the Attorney General may have funded his action. On this basis, the defendants, Morris Manning and the Church of Scientology, argued that, in fact, the case was different from *Dolphin* because Hill was a government actor. Justice Cory rejected this first prong of the defendants' claim regarding Charter application. In doing so, he asserted that a person's reputation, even when it relates to his or her professional reputation as a government employee, is wholly and completely a private interest. It has no public dimension. Cory J. stated: "Reputation is an integral and fundamentally important aspect of every individual. It exists for everyone quite apart from employment."[265]

This assertion that there is something inherently and irredeemably private about certain aspects of social life is the first indication of the Court's willingness in this case to identify the substantive political vision underlying the seemingly neutral calculations of the "branch of government" test. In previous cases, the Court has for the most part eschewed statements that the public/private split underlying section 32 is founded on a transcendental binary division of essential qualities and, instead, has immersed itself in the difficulties of measuring linkages with government action and government control. The claim that reputation is "integral" to the individual and "apart from employment" sets the individual and his or her essential attributes outside the realm of historical experience or social interaction. It cuts off any argument about the particulars of political accountability through public discourse with a claim about the ontological nature of individuality which turns out, in this case, to encompass the professional achievements of a successful prosecutor of offences against the state.

In the course of positioning the *Hill* case on the private side of the public/private divide, Cory J. presented a new map of the cases which attempted, unsuccessfully, to reconcile the freshly revealed transcendental nature of the divide with the government action doctrine. On one side are the "essentially public" cases, namely, cases in which "the court was called upon to consider the operations of the court and to determine the extent of its own jurisdiction to consider matters which were essentially public in nature."[266] This is where Cory J. located, among others, the *Dagenais* case. He did not explain what

[265] *Supra*, note 252, at para. 72.

[266] *Id.*, at para. 94.

unites these decisions under the "essentially public" rubric except to say that they are cases in which the state is acting and thus has consititutional duties. He characterized them as presenting "a very specific type of 'government action' in a civil context".[267] On the other side of the map, Cory J. placed *Dolphin* and *Hill*, cases which he described as "purely private".[268] The "essentially public" cases involve rights and duties because they involve a state actor. The "purely private" cases involve Charter values rather than rights. In Cory J.'s view, *Dolphin*'s statement that court orders are not subject to Charter scrutiny is preserved not only by the rights/values dichotomy but also by the fact that in the "context of civil litigation involving only private parties, the Charter will 'apply' to the common law only to the extent that the common law is found to be inconsistent with Charter values".[269] In addition, and perhaps more convincingly, the dichotomy is reflected in methodological differences. Justice Cory suggested that the now orthodox two-stage framework for Charter analysis first set out in *Oakes* must be adjusted in the "purely private" cases because of the absence of a state party to provide the section 1 justificatory analysis. As parties relying on the common law rule should not have to defend its reasonableness, Cory J. stated the burden should lie on the party challenging the common law rule both to prove an inconsistency with Charter values and to demonstrate the unreasonableness of the inconsistency.[270] Furthermore, Cory J. advised that courts have been and will be extremely cautious about amending the common law, leaving far reaching changes to the legislature.[271]

Justice Cory's category of a "very specific type of government action" is as unhelpful and perplexing as L'Heureux-Dubé J.'s category of "certain judicial conduct" and, like L'Heureux-Dubé J., he was ultimately unwilling to relinquish the *Dolphin* proposition that the common law converges with liberalism's private sphere of social relations. For both of them, it required the addi-

[267] *Id.*

[268] *Id.*

[269] *Id.*, at para. 95.

[270] *Id.*, at para. 98. This appears to contradict the statement by the majority in *Dagenais* that the party defending a publication ban issued under common law authority must defend its reasonableness in the face of a successful s. 2(*b*) challenge: *supra*, note 251, at 890-91.

[271] *Supra*, note 252, at para. 96. However, any far reaching changes by the legislature are, of course, subject to presumably less cautious Charter review under the government action doctrine.

tion of "specific action" or "certain conduct" to transform the common law into government action. In the end, Cory J.'s remapping of the essentially public and purely private, like McLachlin J.'s criminal sphere exception, draws its coherence not from formal differences between branches of government but from the political vision of classical liberalism. In effect, *Dolphin* and *Hill* belong together not so much because the common law on which they are based converges magically and perfectly with a traditional notion of the private sphere, but because in those cases the applicable legal rules give formal legitimacy to distributions of power which are presumed to pre-exist law and the imposition of the political structure of the state. In *Hill*, as stated earlier, reputational interests and professional achievements are ontologically prior to politics; in *Dolphin*, by inference, capital accumulation through the exercise of "natural" rights of property and contract is ontologically prior to politics.[272]

However, the political logic underlying Cory J.'s categories seems to be completely compromised by his acceptance of the second prong of the defendants' argument on the application issue that Charter values nevertheless apply to private sphere relations. Cory J.'s rights/values dichotomy and his assertion that consistency of the common law with the Charter preserves the private sphere are unconvincing, particularly against the backdrop of the significant alteration of the common law in *Dagenais*. Indeed, apart from the proposition that the Charter applies indirectly to the common law, contradictions seem to proliferate when one compares the two cases. In *Dagenais*, the Charter challenge to the common law was successful and resulted in an alteration to reflect the greater weight given to freedom of expression in the Charter. In spite of protestations that there is no hierarchy of rights in the Charter,[273] freedom of expression was portrayed as a "paramount value in Canadian society" by the *Dagenais* majority and its linkage to the functioning of democracy was emphasized by quotations to that effect from previous

[272] Another aspect of the difficulty with relying on the common law and judicial law-making as a proxy for traditional notions of the private sphere, especially in the age of the regulatory state, emerged in *Young v. Young*, [1993] 4 S.C.R. 3. In that case, the Court is presented with a quintessentially private issue, namely, familial disputes concerning child custody, which has been subject to what is usually the most uncontroversial form of government action, namely, legislative regulation. See the discussion in Bakan, Ryder, Schneiderman and Young, "Developments in Constitutional Law: The 1993-94 Term" (1995), 6 S.C.L.R. 67 at 70-77.

[273] [1994] 2 S.C.R. 835 at 877.

Charter cases.[274] In *Hill*, however, the application of the Charter resulted in an affirmation of the balance struck by the common law of defamation between the value of individual privacy and that of freedom of expression. Indeed, although the language of "balance" was used throughout,[275] it seems clear that in *Hill* the reputational privacy of the individual was paramount. In addition, as if to deepen the contrast between the two cases, the jurisprudential tradition of limiting freedom of expression was emphasized. In fact, Cory J. characterized defamatory speech as harmful to democracy[276] whereas with respect to reputational privacy he wrote:

> Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by a libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.[277]

Justice Cory went on to postulate that although no single provision in the Charter explicitly recognizes reputational privacy as a protected right, it is "a concept which underlies all the Charter rights"[278] and is captured in the notion of human dignity. Furthermore, Cory J. suggested that the fact that lawyers have a greater stake in their reputations than other individuals must be considered when weighing freedom of expression values.[279] Thus, it would appear, the constitutional principle of human dignity is more deeply compromised when lawyers rather than others with less tradeable credentials are defamed.

In order to place the *Hill* and *Dagenais* decisions in a framework in which they make political if not doctrinal sense, one must return to the larger features of the substantive political vision which emerges with increasing clarity in all of the Charter cases released by the Supreme Court of Canada this Term. In particular, one must return to the features of the political actor who stands at the centre of classical liberalism's account of the mutual opposition between the public and private

[274] *Id.*, at 876-77.

[275] [1995] 2 S.C.R. 1130, at paras. 97, 100, 107 and 121.

[276] *Id.*, at para. 106.

[277] *Id.*, at para. 108.

[278] *Id.*, at para. 120.

[279] *Id.*, at para. 118.

spheres. This acquisitive self-interested individual, who, in many respects, is socially male, shapes the priorities and commitments within both spheres. Both must reflect his "private" investments in the traditional family, professional authority, and a proprietary notion of self-worth and self-fulfillment. As discussed in "Publication Bans" above, the claimant in *Dagenais* had no such recognizable stake; as a criminal accused he forfeited any entitlement to individual privacy except to the extent that it is subsumed within the Charter and common law protections directed at the procedural propriety of the trial process. The majority listed individual privacy as only one of 14 factors which should inform the issuance of a publication ban.[280] In addition, notwithstanding the fact that Dagenais was invoking a constitutional right to a fair trial, the majority characterized him as "seeking to use the power of the state to achieve this objective".[281] By inference, the C.B.C.'s control of the means of expression exists outside of law and is entitled to protection from interference by the state. Thus, media interests step into the shoes of the individual rights holder whose preferences and priorities are cast as paramount. Because the acquisitiveness and achievements of this individual are integral to its being, and are, as in *Dolphin* and *Hill*, ontologically prior to politics, freedom of the press translates into the freedom of large corporate media interests to increase their purchase on the public space of political discourse and only incidentally, if at all, does it translate into the political accountability of the justice system. In this sense, the triumphant individual who stands for the vindication of reputational privacy in *Hill* is a mirror image of the individual who stands behind the rhetorical linkage between a free press and democracy in *Dagenais*.

Section 32 is indeed superfluous, not because Charter jurisprudence and the common law necessarily and seamlessly reflect each other, but because, in these cases, both are being reformulated in accordance with the same set of values. The balancing of values within both regimes firmly reinscribes the public\private split which underlies the formal language of "branch of government" in section 32 and the various doctrinal measuring sticks generated by the government action doctrine. Indeed, behind the contradictory surfaces presented by *Hill* and *Dagenais* lies perhaps the most important political actor of all, namely, an activist judiciary riding the wave of the latest resurgence of classical liberalism in the broader arena of Canadian and global politics.

[280] *Supra*, note 273, at 882-83.
[281] *Id.*, at 891.

IX. CONCLUSION

Our emphasis on the emergence of the combination of abstract individualism and conservative moral ordering as the central theme of constitutional interpretation is at odds with some other analyses of the Charter. F.L Morton and Rainer Knopf, for example, have identified a very different "ideological bias"[282] in Charter interpretation, one which is opposed to conservative views and decidedly in favour of "new citizen interest groups" which have "sprung up" as a result of the Charter.[283] Morton and Knopf argue that these groups, whom they have labelled "the court party", are able to use litigation to extract from courts concessions favourable to their interests. In their view, the success of the "court party" speaks to the "weakness of the Charter as text"[284] and the departure of judicial review from its "traditional character as a conservative check on democratic change".[285]

Even before this Term, the court party thesis appeared to us to grandly overstate the legal and political power of disadvantaged groups.[286] After reviewing this Term's cases, we are left with little doubt that the current Court is exhibiting no symptoms of being a captive of Charter interest groups. Indeed, a formidable array of intervenors who would likely be characterized as members of the "court party" by Morton and Knopf had their Charter positions decisively rejected by a majority of the Supreme Court: Equality for Gays and Lesbians Everywhere (EGALE) (in *Egan*), Support and Custody Orders for Priority Enforcement (SCOPE) (in *Thibaudeau*), the Native Women's Association of Canada (in *NWAC*), the Charter Committee on Poverty Issues (in *Prosper* and *Matheson*), and the Canadian Civil Liberties Association and a host of writers' and media groups (in *Hill*). It is only a slight exaggeration to say that locating the litigants with a "court party" intervenor on their side

[282] Morton, "The Charter Revolution and the Court Party" (1992), 20 Osgoode Hall L.J. 627 at 634. See also Knopf and Morton, *Charter Politics* (1992).
[283] *Id.*, at 630.
[284] *Id.*, at 651.
[285] Morton and Knopf, "The Supreme Court as Vanguard of the Intelligentsia: The Charter Movement as Postmaterialist Politics" in Ajzenstat (ed.), *Canadian Constitutionalism: 1791-1991* (1992), at 61.
[286] For a critique of the Morton and Knopf view, and a more sophisticated evaluation of Charter politics, see Herman, "The Good, the Bad, and the Smugly: Perspectives on the Canadian Charter of Rights and Freedoms" (1994), 14 Ox. J. Leg. Stud. 589.

would be a reliable means of identifying the failed Charter claimants this Term.

The Court's decisions do confirm the view that "[w]hile in theory constitutional law constrains politics, in practice, politics shapes constitutional development."[287] The text of the Charter is flexible enough to accommodate a wide range of political theories and legal interpretations: witness the three very different approaches to section 15 taken by the justices in the equality trilogy. The Court this Term has chosen not to infuse the vague language of the text with meanings that favour social movements or depart from traditional moral ordering. Instead, the Court adhered to conceptions of society which reflect the "dominant" view of the individual's relationship to the state and society. As a result, most Charter claims by litigants aiming to nudge political practice in the direction of a more tolerant and just society ended up receiving a chilly disposition from the Court this Term.

[287] Morton, *supra*, note 282, at 650.